Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1995

KENNETH CHRISTUNAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND APPENDIX

DOMNICK J. SORISE
Counsel of Record
33830 Harper Avenue
Clinton Township, Michigan 48035
(810) 415-1200

Attorney for Petitioner

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

QUESTIONS PRESENTED FOR REVIEW

I.

DID THE JUDGE COMMIT REVERSIBLE ERROR BY NOT DISQUALIFYING DEFENSE COUNSEL WHO WAS BURDENED BY A CONFLICT OF INTEREST WHICH PREVENTED SUBSTANTIAL IMPEACHMENT OF A KEY GOVERNMENT WITNESS BY PUBLIC RECORDS?

II.

WAS DEFENDANT EFFECTIVELY DENIED HIS RIGHTS TO TESTIFY AND PRESENT A VIABLE DEFENSE BY THE JUDGE'S REFUSAL TO CONTINUE BIFURCATED TRIAL PROCEEDINGS (WHICH HAD PREVIOUSLY BEEN GRANTED TO CO-DEFENDANTS), AND/OR BY INEFFECTIVE ASSISTANCE OF COUNSEL?

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OPINIONS BELOW

The opinions of the district court (Eastern District of Michigan, Southern Division), and the United States Sixth Circuit Court of Appeals are unreported, and are contained herein at Appendix A-75 and A-2, respectively.

JURISDICTION

The United States Sixth Circuit Court of Appeals denied relief in an opinion entered March 8, 1995, and denied rehearing in an order entered on April 12, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V provides in pertinent part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . . be

> deprived of life, liberty, or property, without due process of law . . . "

United States Constitution, Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On April 13, 1992, a grand jury in the Eastern District, Southern Division of Michigan, returned an eight-count indictment against Defendant-Appellant Kenneth Christunas and eleven others. A seven-count superseding indictment was issued on July 16, 1992. Defendant was charged in all counts: count one alleged conspiracy to possess and distribute marijuana through about 1983 to May, 1991, with criminal forfeitures (21 USC 846, 841(a)(1); 853); counts two, three and four alleged possession with intent to distribute marijuana (21 USC 841(a)(1); 18 USC 2); count five alleged conspiracy to launder monetary instruments (18 USC 1956, 371); count six alleged conspiracy to import marijuana (21 USC 952, 963); and count seven alleged continuing criminal enterprise (21 USC 848).

On March 9, 1993, jury trial began before Hon. Paul V. Gadola. Defendant was tried with five co-defendants, his brothers David and James, his brother-in-law Arthur Ricky Brayman, Robert Johnson, and Herbert Micou. The remaining co-defendants plead guilty, and did not testify as government witnesses. During trial, the government dismissed count four (X 4)[1]. On April 4, 1993,

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[1] **Transcript volumes are identified by a roman numeral or the names of the proceeding, followed by the page number. Documents are identified by title, subject matter, and/or date.**

Defendant was convicted on counts one, two, three, five, six, and seven (XV 7-10).

In an opinion dated September 15, 1993, Defendant's motion for judgment of acquittal was granted on count five, and denied on count seven.

On December 14, 1993, Defendant was sentenced to 292 months in prison on count seven, with concurrent terms of 240 months on counts two, three and six. Count one was dismissed as a lesser included offense of count seven (Sent 40-44).

Defendant filed a timely appeal as of right, maintaining among other issues that the trial judge erred by not disqualifying defense counsel who was burdened by an actual conflict of interest, and effectively denied Defendant his rights to testify and present a viable defense by refusing to continue bifurcated trial proceedings. In an unpublished opinion filed March 8, 1995, a panel of the United States Court of Appeals for the Sixth Circuit affirmed Defendant's convictions and sentences. (App A-2). In an order filed April 12, 1995, the panel denied Defendant's timely petition for rehearing. (App A-1).

Before trial, the magistrate denied a motion for severance filed by Defendant Kenneth Christunas and three co-defendants. The magistrate also denied an earlier motion for severance filed by Co-Defendants J. Christunas and Brayman, who had sought a severance and subsequent trial to assert the defense of withdrawal, but did suggest bifurcation of trial proceedings. The district judge, upon request of both groups of defendants and over government objections, granted bifurcation as suggested by the magistrate (I 6-16).

Also before trial, the government informed Defendant's attorney that Susan Sancho, a prior client, would be a witness, and Defendant's attorney informed the government that "he could be a potential witness" (TIII 14-15) (App A-46–A-47). This matter was not brought to the court until after direct examination of the second

witness (I 241-151) (App A-18–A-25), and was not resolved until the fifth day of testimony (V 5-16) (App A-49–A-57).

The government called 22 witnesses in its case in chief. Patrick Ogle (I 104), Robert "Pete" Michelson (III 77), John Fredrikson (IV 164), and Susan Sancho (VIII 10) were informants who offered direct testimony, pursuant to plea, sentence, and other agreements, implicating Defendant and others in marijuana distribution dating back to the early 1980's. These and other witnesses testified that Defendant had purchased, or participated in purchases of marijuana, in Florida and Texas for shipment to Michigan.

Susan Sancho had obtained, through Defendant's attorney and upon a claim of innocent spouse, a $30,000.00 settlement after the death of her husband, Gary Sancho, in drug forfeiture proceedings, and testified that she did not want Defendant's attorney questioning her about any discussions (II 237-238) (App A-28–A-29). Defendant declined to waive his right to cross-examine Mrs. Sancho about the forfeiture proceedings, and the judge approved an arrangement where another lawyer would cross-examine Mrs. Sancho about the forfeiture proceedings without reference to Defendant's attorney, and Defendant's attorney would not be a witness (I 241-251; II 5-7, 231-263; III 5-19; V 5-16) (App A-18–A-25; A-25–A-26; A-26–A-40; A-40–A-49; A-49–A-57). Mrs. Sancho offered testimony implicating Defendant in marijuana trafficking, claiming an extensive knowledge which predated the drug forfeiture proceedings by some 10 years (VII 10-12, 29-31). On cross-examination, Mrs. Sancho claimed little knowledge or recall of the forfeiture proceedings and her innocent spouse defense and settlement, and outside counsel was unable to impeach Mrs. Sancho's claimed knowledge by use of public records (VII 51-53, 77-79).

Testimony of other informants identified Defendant as a source of supply, the person in charge, and a bulk buyer of marijuana (III 24-30; V 135-136; IV 195-204) by hearsay statements allegedly made by co-conspirators (X 32-50), and implicated Defendant and others in a scheme to purchase and retrofit for marijuana importation an ocean-going freighter which was seized by United States Customs before being outfitted (VIII 32-48).

The government also presented a number of bank employees to show that Defendant and others obtained safety deposit boxes, and that cash was found in one box upon opening a closed box in 1988 (VII 10-141; VIII 16-32). The last government witness was IRS Agent Edward Fontanive (VIII 84), whose testimony indicated that Defendant's reported income never exceeded $19,000.00, and was lower, from 1975 to 1984, but increased to $300,000.00 in 1985, and remained over $100,000.00 in 1986 and 1987.

At the close of the government's case, attorneys for Co-Defendants J. Christunas and Brayman asked to withdraw their request for bifurcation, along with the defense of withdrawal (VIII 145) (App A-57–A-58). The judge allowed these co-defendants to do so and to rest without presenting the defense of withdrawal (IX 41-43), and both were acquitted of the charged conspiracy (XV 14-18).

In turn, Defendant's attorney asked the judge to extend bifurcated proceedings to Defendant in order to allow him to present the defense of withdrawal (VIII 146) (App A-58). Counsel stated that Defendant was prepared to testify as indicated in previously filed severance pleadings, and to admit that he was involved in marijuana distribution in the early 1980's, became frightened by an arrest in Florida in December, 1985, discontinued his involvement, and communicated his withdrawal to other members, including his family (VIII 146-147) (App A-58–A-59). Counsel argued that "All the reasons that were offered on behalf of the other Defend-

ants at the beginning of trial, I think, obtain in the case of Mr. Christunas" (IX 9) (App A-64), and sought "the same opportunity" (IX 7) (App A-63). Defense counsel candidly explained that the government case "went in stronger than I thought", and compelled him to re-evaluate the defense position (IX 8, 13) (App A-64, A-67). The government objected, and the judge denied Defendant's request for continuation of bifurcated proceedings (VIII 142-151; IX 5-38) (App A-57–A-61; A-62–A-84). Defendant rested without testifying or presenting witnesses (IX 145), and the jury convicted as charged (XV 7-10).

The particular facts relevant to each issue raised in this petition will be presented in the course of the arguments.

Defendant now timely petitions this Court for writ of certiorari under 28 USC Sec 1254(1).

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REASONS FOR GRANTING THE WRIT

I.

THE JUDGE COMMITTED REVERSIBLE ERROR BY NOT DISQUALIFYING DEFENSE COUNSEL WHO WAS BURDENED BY A CONFLICT OF INTEREST WHICH PREVENTED SUBSTANTIAL IMPEACHMENT OF A KEY GOVERNMENT WITNESS BY PUBLIC RECORDS.

The "Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland* v *Washington*, 466 US 668, 684 (1984). This constitutional guarantee encompasses two correlative rights: the right to effective assistance of counsel, *McCann* v *Richardson*, 397 US 759, 770-771 (1970), and the right to counsel's undivided loyalty, *Wood* v *Georgia*, 450 US 261, 272 (1981). Hence, counsel has "a duty to avoid conflicts of interest". *Strickland* v *Washington*, *supra* at 466 US 688.

To establish a Sixth Amendment violation based on a conflict of interest, defendant must show: (1) counsel actively represented conflicting interests, and (2) an actual conflict of interest adversely affected the lawyer's performance. *Cuyler* v *Sullivan*, 466 US 335, 348-350 (1980). Unlike a challenge to counsel's competence, prejudice is presumed upon such a showing. *Strickland* v *Washington*, *supra* at 466 US 692.

Since *Glasser* v *United States*, 315 US 60, 70 (1942), this Court has refused "to indulge in nice calculations as to the amount of prejudice" once an actual conflict has been shown. *United States* v *Fahey*, 769 F2d 829, 834 (1st Cir, 1985); *Cuyler* v *Sullivan*, *supra* 446 US 349-350. This is the rule of law because "the evil — it bears repeating — is in what the advocate finds himself compelled to refrain from doing". *Holloway* v *Arkansas*, 435 US 475, 490 (1978).

This case invloves an issue of restrained advocacy based on dual loyalties: Defendant's trial attorney, N.C. Deday LaRene, had previously represented an individual, Susan Sancho, whom the government chose to call as a witness. (I 245-251; II 5-7, 231-263; III 5-19; V 5-16; VIII 10-85) (App A-20–A-25; A-25–A-26, A-26–A-40; A-40–A-49; A-49–A-57).

Throughout his appeal to the Sixth Circuit, Defendant maintained, pursuant to *Cuyler* v *Sullivan*, *supra*, that trial counsel actively represented conflicting interests, and that an actual conflict of interest affected trial counsel's performance. The Sixth Circuit opinion did *not* dispute Defendant's showing of an actual conflict of interest adversely affecting his defense, but rather acknowledged that:

> "Ken Christunas' *counsel*, N.C. Deday LaRene, *had an actual conflict of interest* in that he had previously represented Susan Sancho and her husband Gary Sancho in contesting a civil forfeiture of their home based on her husband's drug dealing." Opinion at 9 (footnote omitted; emphasis added) (App A-10).

However, the opinion went on to limit trial counsel's conflict to testifying as a defense witness regarding his former client and the current government witness:

> "Susan Sancho was to be, and was called, as a government witness. LaRene brought the potential conflict to the attention of the court, initially pointing out that he would not be able to testify on Christunas' behalf with respect to Susan Sancho's testimony, unless he withdrew as Christunas' counsel." Opinion at 9 (App A-10).

From this limited perspective, the opinion had no difficulty in summarily concluding that Defendant "waived any claim of ineffective assistance of counsel based on LaRene's failure to withdraw as counsel", relying solely

on *United States* v *Lowry*, 971 F2d 55 (7th Cir, 1992). Opinion at 9-10. (App A-10–A-11).

Defendant submits that the foregoing view is erroneous and ignores significant facts and circumstances of the case, and as a result conflicts with this Court's decision in *Wheat* v *United States*, 486 US 153, 159-160 (1988), and circuit court decisions such as *United States* v *Fahey*, *supra* at 769 F2d 835; *United States* v *Iorizzo*, 786 F2d 52, 54, 57-58 (2d Cir, 1986).

In essence, *Wheat*, *supra* at 486 US 159-160, instructs that "the Sixth Amendment right to choose one's own counsel is circumscribed in several important respects" and that "But no such flat rule [waiver cures any problems] can be deduced from the Sixth Amendment presumption in favor of counsel of choice." This is so because the federal bench has independent duties and mutiple interests:

> "...'the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer he prefers.' Moreover, federal courts have 'an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that the legal proceedings appear fair to all who observe them.' [*Wheat*]. *Id.* at 160; 108 SCt at 1698. When a lawyer's conflict, actual or potential, may result in inadequate representation of a defendant or jeopardize the federal court's institutional interest in the rendition of a just verdict, a trial judge has discrection to disqualify an attorney or decline a proffer of waiver. *Id.* at 162-63, 108 SCt at 1698-99." *United States* v *Fulton*, 5 F3d 605, 612 (2d Cir, 1993).

Here, the conflict was admitted actual, and was *not* limited to the problem of offering contradictory testimony,

but extended to the right of full and effective cross-examination. Indeed, Defendant's firmly stated position at trial was that the cross-examination of Susan Sancho should *not* exclude the prior drug forfeiture proceedings or her innocent spouse claims. (III 8-9) (App A-42-A-43).

This position was not knowingly, intelligently, or voluntarily waived by Defendant. Rather, it was lost through attrition and momentum occasioned by the following circumstances at trial.

The record indicates that on February 1, 1993, the government informed Defendant's attorney that Mrs. Sancho would be a witness, and Defendant's attorney informed the government that "he could be a potential witness" (III 14-15) (App A-46-A-47). Defendant was apparently informed of the situation "in advance of trial", but the matter was not brought to the court until after jury selection, opening statements, and direct examination of the second witness, on March 15, 1993 (I 241-251) (App A-18-A-25). See, *Cuyler* v *Sullivan*, *supra* at 446 US 347. The matter was not concluded until March 29, 1993 (V 16) (App A-57), after the government had presented at least three of its key witnesses — Patrick Ogle (I 169), Robert "Pete" Michelson (III 77), and John Frederikson (IV 164).

Herein lies much of the problem — the matter was not even addressed until trial, when all parties gained an interest in continuing because of the investment of time, effort and resources. In *United States* v *Fulton*, *supra* at 5 F3d 612-613, defendant argued "that his waiver is invalid because the district court abused his discretion in not disqualifying trial counsel after the allegations were aired and the conflict became apparent" during trial. The Court agreed, stating:

> ". . . we certainly appreciate that the able district judge in this case was caught by surprise — a situation the government should have prevented

by the simple expedient of informing the district judge of the allegations in advance of trial." *Id.* at 612-613.

The judge in this case struggled with the issue, at first not seeing the problem and asking defense counsel to make inquiry of Defendant (I 248-251) (App A-22-A-25). The judge revisited the issue the next morning, believing "there are still some remaining problems" and wanting "an opportunity to address that whole situation before Mrs. Sancho was called" (II 5-7) (App A-25-A-26). Later in the day, Susan Sancho was examined on a separate record, with the judge finding "Mrs. Sancho has indicated to the Court's satisfaction that she considered you, Mr. LaRene, to be her attorney at the time of these forfeiture proceedings" (II 235-239) (App A-27-A-30), which were based on drug trafficking (I 248; III 5) (App A-22-A-23; A-40-A-41). Mrs. Sancho had obtained, upon a claim of innocent spouse, a $30,000.00 settlement after the death of her husband Gary Sancho, and testified that she did not want attorney LaRene questioning her about any discussions or meetings (II 237-238) (App A-28-A-29).

The judge quickly concluded that counsel could not cross-examine or be a witness regarding "the contacts and the communications that you had with her during the handling of her legal business" (II 241-242) (App A-31-A-32). But see, *Clark* v *United States*, 289 US 1 (1933). However, counsel indicated that there were other conversations which would not be privileged "because of the presence of third parties", and that he wanted to question Mrs. Sancho about her claim of innocent spouse in the forfeiture pleadings "avoid[ing] the issue of who the lawyer was" (II 243-245) (App A-32-A-34). The judge recognized that the proposed cross-examination had substantial value, and serious problems.[2]

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2 **"I think it's pretty clear that — that were you to get into that matter of — in an attempt on cross-examination to**

(concluded on page 12)

Defendant thereafter indicated that he wanted to confer further with counsel, and the judge encouraged him to seek advice from independent counsel (II 250-251) (App A-37–A-38). Defendant was given the next day, an off-day, to do so (II 251) (App A-38). Before this proceeding concluded, defense counsel suggested "one of the options that may be available is to have another lawyer come in to represent Mr. Christunas for purposes of cross-examination of Mrs. Sancho . . . regarding the pleading in question", but had second thoughts because the jury might "learn in the course of that, that I had in fact represented her and Gary Sancho" (II 252-253) (App A-38–A-39). This suggestion became the end result, but it did not remedy the conflict, and had foreseeable adverse effects on the representation of Defendant. See, *Hoffman* v *Lecke*, 903 F2d 280 (4th Cir 1990) (Where the presence of counsel without a conflict did not overcome the deficiency of counsel with a conflict of interest).

At the next court date, Defendant's position was asserted by trial counsel:

> "MR. LaRENE: Mr. Christunas and I have come to the conclusion that it is — would be appropriate — well, that the cross-examination should be conducted — the cross-examination of Mrs. Sancho that might — that would touch upon her position taken in the — in the resolution of the forfeiture case should be conducted — should be a part of the cross-examination.

(*continued from page 11*)

> **show that she had at one time at least taken a position at a time she was represented by you — she had adopted a position at that point that she knew nothing about any narcotics dealing by her husband and then presumably here now gives some testimony of a different character, I think you'd be in a — *really impossible situation.*" (*Emphasis added*) (II 246) (App A-35).**

> Mr. Christunas wishes me to continue as his attorney and does not wish to waive his right to conflict-free representation in order to have me continue as his attorney and does not wish to have me avoid the area of cross-examination that we discussed.
>
> However, he has also consulted with Mr. Robert Morgan[3] who is in court today, who is a lawyer, a member of the bar of this court, and consulted with him at some length, and we propose — and it is acceptable to Mr. Christunas as a way to resolve, in our view, the — the issue and the conflict now before the Court — that Mr. Morgan will — or should be permitted to conduct the cross-examination of Mrs. Sancho regarding the forfeiture case." (III 8-9) (App A-42–A-43).

Defendant's position obviously precluded attorney LaRene from testifying as a defense witness, and attorney Morgan from access to any documents within the scope of the attorney-client privilege, and Defendant was so advised immediately (I 9-15).

The judge also inquired of attorney Morgan, who requested time for preparation, *including* "to review the civil forfeiture file" (III 15) (App A-47). The judge granted the request, expressed uncertainty and took the matter under advisement until March 29, 1993, but continued with the testimony of other government witnesses (III 17-19) (App A-48–A-49). At no time during this proceeding was it stated that attorney Morgan would not be able to use the Sancho "civil forfeiture file" for impeachment, which was at the heart of Defendant's position. See, *Wheat* v *United States*, 486 US 153, 163 (1988).

In the interim, the government presented two of its key witnesses, Michelson (III 77) and Fredrikson (IV 5).

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3 Attorney Morgan was representing attorney LaRene on a pending indictment in the same courthouse (V 15-16) (App A-56–A-57).

Defendant was waist-deep into the trial on March 29, 1993, when the judge returned to the matter (V 5-9) (App A-49–A-52). For the first time it was indicated by defense counsel that attorney Morgan would not introduce documents from the "civil forfeiture file" for impeachment of Mrs. Sancho (V 10) (App A-53). Even the judge blinked (V 11-12) (App A-53–A-54).[4]

Mrs. Sancho thereafter offered testimony implicating Defendant in marijuana trafficking, claiming an extensive knowledge which predated the drug forfeiture proceedings by some ten years (VII 10-12, 29-31). However, on cross-examination, Mrs. Sancho claimed little knowledge or recall of the forfeiture proceedings and her innocent spouse defense and settlement.[5]

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4 **"THE COURT: In other words, it's your understanding that he would seek to introduce the — the agreements?**

MR. LaRENE: No, no. I don't —

THE COURT: No?

MR. LaRENE: No. he — he will not seek to introduce the documents themselves, just cross-examine her about their existence. The reason that he won't introduce the documents is because they bear my signature, and we think that it is inappropriate to put before the jury the fact that I represented her and thereby put into issue my credibility or my conduct as her lawyer." (V 11-12) (App A-53–A-54).

5 **"Q And you knew there was a complaint filed in federal court, in United States District Court, here in Detroit, in the Federal building, a complaint for them to keep your home. You knew that, didn't you?**

A I know they were trying to take the home. That's all I know.

Q They were trying to. That's all you know? You don't know if there were any papers filed, that there was a lawsuit, that was assigned to a judge? You don't know anything about that?

A There was a sticker on the door of our house.

Q Well, and you saw some — some papers, at some point in time, didn't you, a complaint to forfeit, a law document filed in court? You saw some papers, did you now?

(concluded on page 15)

In *United States* v *Fahey*, *supra*, at 769 F2d 835, the First Circuit indicated that a proposed or tendered "waiver doesn't foreclose the possibility that an actual conflict could have adversely have affected the adequacy of representation." In *United States* v *Iorizzo*, *supra* at 786 F2d 57-58, the Second Circuit rejected government arguments for waiver concerning "earlier representation of the government's key witness in a related state proceeding" because:

> "The decision to forgo inquiry was thus made solely to protect the interests of defense counsel.
>
> Supreme Court decisions require us to reverse the convictions in such circumstances." [footnote omitted]

Such applies to, and should obtain, in this case because the judge stated and realized "Mr. LaRene could be treading on treacherous ground" (I 249) (App A-23); "there is a serious problem here" (II 244) (App A-33); "you'd be in a — really impossible situation" (II 246) (App A-35); and, "I may come to the conclusion that it's necessary to take other action" (III 18) (App A-49).

(*continued from page 14*)

A I don't recall.

Q You don't recall?

A. No. (VII 51)

* * *

Q Would it be fair to say that, in connection with that lawsuit, your position was that you were an innocent spouse? You didn't know anything about the marijuana business?

A I'm just confused. Would you repeat that, because I'm getting tired?

Q All right. Would it be fair to say that, in connection with that lawsuit, about the Wahrman house, your position in that lawsuit was that you were an innocent spouse? You didn't know anything about the marijuana business? Was that your legal position in that case?

A. I'm not sure." (VII 78)

The Sixth Circuit's total reliance on *United States* v *Lowry*, *supra* at 971 F2d 61, is misplaced because even there the Court emphasized that conflict-waiver issues are:

> ". . .fact-intensive, and we must thoroughly examine the facts and circumstances of the case, 'including the background, experience, and conduct of the accused.' *Johnson* v *Zerbst*, 304 US 458, 464; 58 SCt 1019, 1023; 82 LEd 1461 (1938)."

Lowry, *Id.* at 57, 62 n 6, was a unique case in many respects, including facts of a massive fraud which "read like the plot outline of a prime time movie to be shown during television's sweeps week", and a defendant who "was fifty-eight years old at the time of the trial, had the equivalent of two years of college, had taught at two business colleges, and had run his own mail-order and printing business since the mid-1960's".

Here, the record is not only devoid of such critical facts on the one hand, but affirmatively shows on the other hand that Defendant "does not wish to have me [trial counsel] avoid the area of cross-examination that we discussed" (III 8-9) (App A-42-A-43). While Defendant may have previously waived trial counsel as a defense witness (I 9-15), he made no waiver regarding the subject matter and content of cross-examination, regardless of the attorney involved (III 8-9) (App A-42-A-43). It is surprising that the district judge countenanced any restriciton on Defendant's rights to confrontation in light of the fact that he had previously granted substitute counsel's request for a continuance to prepare and "to review the civil forfeiture file" (III 15-19) (App A-47-A-49). It was more than suprising to Defendant who was "whipsawed" by another restriction and the continuation of trial, and between waiving his right to a conflict free attorney or his right to full cross-examination. Defendant had neither in the end.

Since this Court is obliged to "indulge in every reasonable presumption against waiver of fundamental

rights", *Johnson* v *Zerbst*, 304 US 458, 464 (1938), and this record indicates that such a waiver was not properly made or accepted. Defendant's petition for writ of certiorari should be granted.

II.

DEFENDANT WAS EFFECTIVELY DENIED HIS RIGHTS TO TESTIFY AND PRESENT A VIABLE DEFENSE BY THE JUDGE'S REFUSAL TO CONTINUE BIFURCATED TRIAL PROCEEDINGS (WHICH HAD PREVIOUSLY BEEN GRANTED TO CO-DEFENDANTS), AND/OR BY INEFFECITVE ASSISTANCE OF COUNSEL.

Rule 14 of the Federal Rules of Criminal Procedure affords the district judge the discretion to "provide whatever other relief justice requires" with respect to severance and related requests. In *Zafiro* v *United States*, 133 SCt 933, 938 (1993), this Court further provided the district judge with the discretion for "the tailoring of the relief to be granted".

In an oral opinion (I 6-16) and a written opinion on March 15, 1993 (App A-14), the district judge in this case granted a bifurcated trial, as suggested by the magistrate,[6]

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6 **"Under the partial bifurcation envisioned by the undersigned, all six defendants would proceed to trial at the same time before the same jury. The government would present all of its proofs against all six defendants. At such time as the prosecution rests, defendants Kenneth Christunas, David Christunas, Robert Johnson and Herbert Micou would be invited to put forward any proofs that these four defendants choose to present. After these defendants have rested, and the government had been given its chance to present rebuttal evidence, the jury would be instructed and final arguments would be presented regarding the guilt or innocence of these four defendants only. Following the return of jury verdicts with regard to these four defendants, the Court would reconvene the trial before the same jury panel and permit defendants James Christunas and Arthur Brayman to present their proofs. This would give these two defendants an opportunity to**

(*concluded on page 18*)

to Co-Defendants James Christunas and Arthur Brayman, who had sought a separate and subsequent trial in order to assert the "available" defense of withdrawal based on the "likely" testimony of Defendant Kenneth Christunas. In doing so, the judge could "identify no prejudice that will inure the government as a result of bifurcation", and found this remedy would "not be unduly burdensome or confusing to the jury." (App A-14). The judge also took specific note of the fact that trial would involve "co-defendants who are to another close family relations", finding in essence that without severance or bifurcation, the defense of withdrawal would result in family members "aiding the prosecution in its case", or being "unduly pressured either into testifying or into not testifying" (App A-16).

The judge was careful to provide the jury with preliminary instructions regarding bifurcated proceedings pursuant to government request (I 12, 20-23), and not to mention the defense of withdrawal upon stipulation of all parties (I 15).

By rule and rulings, decisions regarding severance are committed to the sound discretion of the trial court. Fed R. Crim P. 14; *Zafiro* v *United States*, *supra*, at 113 SCt 938. Those challenging the trial court on appeal must show an abuse of discretion, by a burden described as "heavy" and "very significant". *United States* v *Sivils*, 960 F2d 587, 594 (6th Cir, 1992); *United States* v *Causey*, 834 F2d 1277, 1288 (6th Cir, 1987). These propositions are firmly established, and aptly demonstrated by *United States* v *Crane*, 499 F2d 1385 (6th Cir, 1974), where the

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(*continued from page 17*)

> **attempt to secure the possibly favorable testimony of defendant Kenneth Christunas.**
>
> **"Based on the foregoing analysis, IT IS ORDERED that the motion is DENIED without prejudice to the filing of a request for bifurcation for consideration by the trial judge."**

Court expressed general disapproval of bifurcated trial proceedings, but declined to reverse. See also, *Vincent* v *Parke*, 942 F2d 989, 993, 1000-1001 (6th Cir 1991).

In *United States* v *Swift*, 308 F2d 320, 323 (6th Cir, 1987), the Sixth Circuit ruled that "after January 1, 1987, we hold that a severance motion will be deemed waived if it is not renewed *at the end of the evidence*." (emphasis added). This ruling was derived in part from *United States* v *Guess*, 745 F2d 1286, 1289 (9th Cir, 1984), *cert denied*, 469 US 1225 (1985), where the Court stated that: "The failure to renew the motion as prejudicial evidence unfolds 'cannot serve as insurance against an adverse verdict.'" (citations omitted). Indeed, in *Shaffer* v *United States*, 362 US 511, 516 (1960), this Court held that the trial court itself "has a continuing duty at all stages of the trial to grant severance if prejudice does appear."

In this case, the trial testimony presented circumstances for reconsideration, and the defense attorneys brought matters to the judge following the testimony of the last government witness (VIII 142-151; IX 5-38) (App A-57-A-61; A-62-A-84). Attorneys for Co-Defendants J. Christunas and Brayman asked to withdraw their request for bifurcation, along with the defense of withdrawal (VIII 145) (App A-57-A-58). The judge allowed co-defendants J. Christunas and Brayman to rest without presenting the defense of withdrawal (IX 41-43), and both were acquitted of conspiracy charges. (XV 14-18).

In turn, Defendant's attorney asked the judge to continue to bifurcated proceedings in order to allow Defendant "to present the defense of withdrawal" (VIII 146) (App A-58). Counsel stated that Defendant was prepared to testify as indicated in severance pleadings, and to admit that he was involved in marijuana distribution in the early 1980's, became frightened by an arrest in Florida in December, 1985, discontinued his involvement, and communicated his withdrawal to other members, including his family, well before the statute of

limitations period for indictment (VIII 146-147) (App A-58–A-59). Counsel emphasized that Defendant would testify, and that bifurcated proceedings were necessary "to protect Mr. Christunas' constitutionally protected right to testify" (IX 19) (App A-71). Counsel flatly stated, and the judge clearly understood, that Defendant "would not advance this defense of withdrawal at a joint trial" (VIII 149) (App A-60), arguing that Defendant "cannot fairly be asked to offer his own defense at the expense of his brothers" (IX 9) (App A-64). Counsel argued that "all of the reasons that were offered on behalf of the other defendants at the beginning of the trial, I think, obtain in the case of Mr. Christunas" (IX 9) (App A-64), and sought "the same opportunity" (IX 7) (App A-63).

Defendant's attorney candidly explained that he did not have "a great deal of taste for the defense of withdrawal", but that government case "went in stronger than I thought", to which the government replied "from a qualitative standpoint, that may be true, but in terms of the nature and substance . . . that had been known to defense counsel well in advance of trial" (IX 13) (App A-67). Counsel indicated that these and other circumstances compelled him to re-evaluate the defense position:

> "And if I advised him wrongly in the first instance, I suppose that's possible. It seems to me maybe I did, and I should have anticipated what this case was going to be like, and I should have told him right from the beginning that this was the defense we should use. And I should have presented it to the jury. I should have done all that, but I didn't, and now at the eleventh hour, I must to the best I can and that's what I'm trying to do." (IX 8) (App A-64).

The government "very strenuously" objected to the defense request as "what appears to be a manipulation by the defense team" (VIII 50; IX 11-18) (App A-65–A-71).

The judge denied Defendant's request for continuation of bifurcated proceedings (IX 24-38) (App A-74-A-84). In doing so, the judge stated that his original ruling on bifurcation had "really stretched a point" because "there had not been provided an assurance that the testimony would be given" (IX 32-33) (App A-80-A-81). While recognizing that Defendant's attorney may have underestimated the strength of the government case (IX 37-38) (App A-83-A-84), and that "an entire switch and reversal of strategy and tactics" were "possible", the judge nevertheless concluded that the request for continuation of bifurcated proceedings was "a sort of a crass attempt to manipulate the — the Court in this particular instance, and the Court is not going to countenence it." (IX 38) (App A-84), adding that the government would be prejudiced (IX 36) (App A-83) and Defendant had not met the tests of *United States* v *Causey, supra* (IX 38) (App A-84).

The Sixth Circuit rejected this issue in summarily fashion:

> "After the government had presented its case-in-chief, Ken Christunas requested that the trial be bifurcated so that he could present a withdrawal defense. The district court denied the motion, basing its determination primarily on the grounds that Christunas had not satisfied the test of *United States* v *Causey*. See, 834 F.2d at 1287. Having carefully reviewed this record, we find that the district court did not abuse its discretion in making this determination." Opinion at 10 (App A-11).

The refusal and rejection of the lower courts were clear error because the reasons and concerns for the initial bifurcation remained the same — the right to present an avaiable defense without unfair prejudice or undue pressures (I 10-11). The procedures were still in place, and could have been easily adjusted (X 74). Counsel had only requested that the "same opportu-

nity" (IX 7) (App A-63) be extended to Defendant, upon whose testimony bifurcation had originally been based and obtained (I 10). By refusing to continue or extend bifurcation to Defendant, the trial judge ignored and infringed upon Defendant's constitutional right to testify, and effectively denied Defendant his constitutional right to present a defense.[7] See, *Rock* v *Arkansas*, 483 US 44, 49-53 (1987), ("In fact, the most important witness for the defense in many criminal cases is the defendant himself"); *In Re Oliver*, 333 US 257, 273 (1948); *Ferguson* v *Georgia*, 365 US 570 (1961); *Chambers* v *Mississippi*, 410 US 284, 302 (1973).

The various requirements outlined in *United States* v *Causey*, *supra*, at 834 F2d 1287, should not have been rigidly applied because bifurcation is "less drastic, a remedy short of severance" (IX 13-14) (App A-67–A-68, not requiring near duplication of judicial procedures and resources. In *United States* v *Joshua*, 976 F2d 844, 843 (CA 3, 1992), the Court concluded that bifurcated trial proceedings struck "an appropriate balance between the concern about prejudice to the defendant and considerations of judicial economy".

Moreover, Defendant was asserting his rights to testify and present a defense (IX 8, 19) (App A-64, A-71), as opposed to contending that "if tried in a separate proceeding one of the co-defendants would have given excuplatory testimony". *United States* v *Causey*, *supra* at 834 F2d 1287. In *United States* v *United States Gypsum Co.*, 438 US 422, 464-465 (1978), this Court indicated that "Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." (citation omitted).

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7 Defendant rested without testifying or presenting witnesses (IX 145), as previously indicated by counsel (VIII 149) (App A-60).

The characterization, first by the government (VIII 150) (App A-61) and then by the judge (IX 36, 38) (App A-83, A-84), of the defense request as manipulative was unwarranted, and also ignored counsel's basic and constitutional obligation to effectively represent Defendant and present the best available defense, along with counsel's specific and continuing duty to bring severance matters to the court's attention upon development or at the close of the government's case. In *Estelle* v *Williams*, 425 US 501, 512 (1976), this Court stated that "the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." In *United States* v *Joshi*, 896 F2d 1303, 1306 (CA 11, 1990), a defense request for bifurcation was not made until the close of the government, and was only occasioned by the desire of co-defendants to testify and allegations that the co-defendants "might offer perjurious testimony implicating Joshi". The Court, in affirming the convictions of the co-defendants, upheld the trial court's use of bifurcated proceedings which had been requested by defendant in order for his case to be heard by the jury without being prejudiced by the anticipated testimony of his co-defendants.

Here, the judge could not, and did not, fault attorneys for Co-Defendants J. Christunas and Brayman for reversing trial strategy at the close of the government's case, which the judge described as "not as strong as they might have anticipated" (IX 37) (App A-83). Where the government's case comes in much stronger than anticipated (IX 7, 37) (App A-63, A-83), no less of an opportunity should obtain for another to present the best available defense.

Defendant was severely prjudiced by not being afforded the opportunity "to explain truthfully much of the very damaging evidence that has come in in the last few days" (IX 8) (App A-64). See, *United States* v *Walker*, 772 F2d 1172, 1179 (5th Cir, 1985) ("Where the very point

of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance".) Bifurcation for the defense of withdrawal would have eliminated much of the direct testimony implicating the Defendant because the evidence predated the statute of limitations (I 190, 204-204, 209, 226; III 78, 85, 105, 116, 119, 124, 130, 133, 137, 141, 153, 156; IV 165, 168, 196-198, 202, 208, 222-223; V 145; VI 261; VIII 32-34).

Alternatively, it is submitted that Defendant's trial counsel, who was provided with "complete discovery", according to the government, "well in advance of trial", made serious errors which were prejudicial to Defendant's defense, and deprived him of a fair trial, because counsel admittedly "should have anticipated what this case was going to be like", and "told him [Defendant] right from the begining that this [withdrawal] was the defense we should use" (IX 8) (App A-64). *Strickland* v *Washington*, 466 US 668, 687 (1984).

One way or the other, Defendant's petition should be granted because he was denied his rights to testify and present a viable defense.

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SUMMARY AND CONCLUSION

For the above reasons, this Honorable Court should grant Petition for Writ of Certiorari, reverse Defendant's convictions, and remand for new trial.

Respectfully submitted,

By: /s/ DOMNICK J. SORISE
Counsel of Record
33830 Haper Avenue
Clinton Township, Michigan 48035
(810) 415-1200

Dated: July 7, 1995

APPENDIX TO PETITION FOR CERTIORARI

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ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals — Sixth Circuit)

(Filed April 12, 1995)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH CHRISTUNAS, Defendant-Appellant — Case No: 94-1070)

BEFORE: JONES and BATCHELDER, Circuit Judges; BECKWITH,* District Judge.

Upon consideration of the petition for rehearing filed by the defendant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

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* **The Hon. Sandra S. Beckwith, U.S. District Court for the Southern District of Ohio, sitting by designation.**

OPINION AFFIRMING CONVICTIONS AND SENTENCES

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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(United States Court of Appeals — Sixth Circuit)

(Filed March 8, 1995)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HERBERT MICOU, ROBERT JOHNSON, DAVID CHRISTUNAS, and KENNETH CHRISTUNAS, Defendants-Appellants — Nos. 93-2161/2163/2162, 94-1070; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: JONES and BATCHELDER, Circuit Judges; BECKWITH,* District Judge.

PER CURIAM.

Defendants appeal their convictions and sentences on charges of conspiracy to distribute marijuana. For the reasons stated herein, we AFFIRM the decision of the district court.

I.

On April 13, 1992, twelve persons, including Appellants in this case, Herbert Micou, Robert Johnson, David Christunas and Kenneth Christunas, were indicted for conspiracy to distribute marijuana and related charges. Six of the charged defendants pled guilty prior to trial. Trial against the remaining six defendants began on March 15, 1993.

The government called 22 witnesses in its case in chief. Among the witnesses and evidence presented

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* **The Hon. Sandra S. Beckwith, United States District Court Judge for the Southern District of Ohio, sitting by designation.**

were the following. Missouri State Highway Patrol Officer Wade Stuart testified that on June 18, 1990 he stopped a vehicle driven by Patrick Ogle. Patrick Ogle consented to a search of the trunk where 200 pounds of marijuana was found. Patrick Ogle agreed to cooperate with the police and make a controlled delivery to Michigan. Ogle testified that upon arrival in Detroit he checked into a motel and called David Christunas. David Christunas came to the motel and left in the car Ogle had driven from Texas.

Michigan State Police officers observed Christunas drive from the motel to Herbert Micou's home where the vehicle pulled into the garage and the door was shut. About forty minutes later the vehicle left the residence. Shortly thereafter officers stopped the vehicle and found only 100 pounds of marijuana still in the trunk. Christunas was arrested.

Police officers executed search warrants for both Micou's and Christunas' residences. At Micou's home, officers seized approximately 100 pounds of marijuana, three firearms, and about $13,000 cash. At David Christunas' residence, officers seized three firearms, a pound of marijuana, and approximately $293,000 cash.

Lawrence Zakalowski and Susan Sancho testified that Ken Christunas was Gary Sancho's[2] supplier of marijuana. Several bank employees testified with regard to safety deposit boxes that Ken Christunas had at various Detroit area banks. In one of these safety deposit boxes, $74,000 was found, after it had been opened by bank personnel when Christunas failed to make rental payments.

Several witnesses testified that Defendant Ken Christunas would purchase marijuana in Florida for shipment to Michigan. Robert Michaelson testified that in 1983-84, he loaded marijuana into vehicles in Florida and he had seen David Christunas in Florida about four times

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2 **Gary Sancho is the deceased husband of Susan Sancho.**

during that period. John Fredrickson testified that in 1985-86 he drove quantities of marijuana between Florida and Michigan and Michigan and Texas. Carole Bowen testified that she began a broker-supplier relationship with David Christunas, using John Frederickson and Thomas Christunas as drivers for transporting marijuana from Texas to Michigan.

On April 14, 1993, the jury returned guilty verdicts against the four appellants; Arthur Ricky Brayman and James Christunas were acquitted. Appellants received the following sentences: Micou – 97 months for conspiracy to distribute marijuana; Johnson – 210 months for conspiracy to distribute marijuana; David Christunas – 182 months for conspiracy to distribute marijuana and possession with intent to distribute marijuana; Ken Christunas – 292 months for operating a continuing criminal enterprise and 240 months for possession with intent to distribute marijuana and conspiracy to import marijuana.

Defendants have now appealed and raise numerous issues. We find that none of the issues raised, however, warrants reversing any determination of the district court.

II.

A.

Micou first argues that reversible error occurred when certain evidence and testimony was admitted at trial. We disagree.

This court reviews the district court's decisions to admit or exclude testimony or other evidence for an abuse of discretion. *United States* v. *Bonds*, 12 F.3d 540, 554 (6th Cir. 1993); *United States* v. *Rios*, 842 F.2d 868, 872 (6th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989). Moreover, Federal Rule of Criminal Procedure 52(a) instructs this court that in reviewing this case, "[a]ny

error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." We first find that the district court did not abuse its discretion in admitting evidence of the firearms at trial. We further find that even if the district court had abused its discretion in admitting this evidence, it is clear that given the substantial other evidence against Micou, the admission of this evidence was at most harmless error. *See United States* v. *Baro*, 15 F.3d 563, 568 (6th Cir.) (extensive trial testimony supporting evidence of defendant's guilt made admission of tainted evidence harmless error) (citing *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967)), *cert. denied*, 115 S. Ct. 285 (1994).

Micou next argues that a statement by Fredrickson concerning the registration of a 1985 Lincoln Town Car into which Fredrickson had loaded marijuana was inadmissible hearsay. We find that even if this testimony did constitute hearsay, other evidence made its admission harmless error. The government introduced evidence that Micou had purchased a 1985 Lincoln Town Car. Fredrickson legitimately testified that he had loaded the marijuana into a 1985 Lincoln Town Car. Approximately 100 pounds of marijuana and $13,000 in cash were found in Micou's house.

B.

Micou and David Christunas argue that the district court erred in denying their motion to dismiss the indictment without holding an evidentiary hearing. Whether to hold an evidentiary hearing on an issue is a matter within the court's discretion. This court reviews matters within the discretion of the district court for an abuse of discretion. *United States* v. *Frost*, 914 F.2d 756 (6th Cir. 1990). The district court did not abuse its discretion in denying Micou and David Christunas' motion to dismiss the indictment for violation of the Double Jeopardy Clause, without holding an evidentiary hearing, because the defendants' assertions of fact, even if true, did not entitled them to relief.

The Double Jeopardy Clause is not implicated when a conviction for a substantive crime is followed by a prosecution for conspiracy to commit that substantive crime. *See United States* v. *Felix*, 112 S. Ct. 1377 (1992) ("a substantive crime, and a conspiracy to commit that crime are not the 'same offense' for double jeopardy purposes"). The district court did not abuse its discretion in denying an evidentiary hearing on this issue.

C.

As his final issue, Micou argues that evidence of the items seized from his residence[1] on June 19, 1990, should have been suppressed because the search warrant under which the items were seized lacked probable cause. In summary, the affidavit underlying the search warrant stated that the affiant had received a tip that a car under surveillance contained marijuana; a trained dog had detected narcotics in the trunk of the car; a person came to the motel in one car, then left in the suspect car; the suspect car was then driven to Micou's residence and parked in the garage that was attached to the house. Based on this information a judicial officer issued a search warrant for Micou's residence. Micou does not argue that this information does not support a finding of probable cause. Instead, he argues that had the judicial officer been informed that the car had subsequently left Micou's house that the judicial officer would have found the probable cause to be lacking. The argument is without merit. When new circumstances bring into question the original finding of probable cause, the officers seeking the warrant must bring new information to the magistrate's attention. *United States* v. *Bowling*, 900 F.2d 926, 993 (6th Cir.), *cert. denied*, 498 U.S. 837 (1990). If, however, this court finds that a neutral magistrate would still have found probable cause to exist had she been apprised of the new information,

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1 **[*Printer's Note:* footnotes renumbered here as in original opinion.] The bags of marijuana, three firearms and $13000 cash.**

then the fruits of the warrant are not to be suppressed. *See id.* at 933-34. In the instant case, the additional facts that would have been brought to the magistrate's attention included the fact that a later stop of the car that left Micou's residence revealed that half of the marijuana in the car had been removed. We find that knowledge of additional facts in this case would not have dispelled probable cause.

D.

Defendant Johnson raises two issues: whether the district court erred in denying his motion for severance, and whether certain closing arguments of the prosecutor amounted to reversible error. We find no error on the part of either the district court or the prosecutor.

At the close of the government's case-in-chief, Johnson's counsel stated that Johnson wished to present a defense of withdrawal from the conspiracy, and based on his desire to present this defense, he requested bifurcation.[2] Johnson's counsel also stated that Ken Christunas would testify on behalf of Johnson if bifurcation were granted.[3] The district court denied Johnson's motion for severance. This court reviews a district court's grant or denial of a motion for severance for an abuse of discretion. *United States* v. *Moreno*, 933 F.2d 362, 369 (6th Cir.), *cert. denied*, 112 S. Ct. 265 (1991). We find that the district court properly applied this court's teaching in *United States* v. *Causey*, 834 F.2d 1277, 1287 (6th Cir. 1987) (quoting *United States* v. *Butler*, 611 F.2d 1066, 1071 (5th Cir.), *cert. denied*, 449 U.S. 830 (1980)), *cert. denied*, 486 U.S. 1034 (1988), in denying Johnson's motion for severance.

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2 At the same time, Ken Christunas also requested that the trial be bifurcated so that he could present a withdrawal defense.

3 In the joint trial, Ken Christunas stood on his Fifth Amendment privilege against self-incrimination, and did not take the stand.

Also at issue is a statement by the prosecutor concerning accountability. The statement did not amount to an improper effort to arouse the passion and prejudice of the jury that would warrant reversal of defendants' convictions. In *United States* v. *Solivan*, 937 F.2d 1146 (6th Cir. 1991), the prosecutor had commented to the jury "I'm asking you to tell her and all of the other drug dealers like her that we don't want that stuff. . . ." *Id.* at 1152. In the instant case, the prosecutor made no reference to other drug dealers, but only addressed the conduct of the defendants. As such, the statement was no more than "an innocuous reference to the community or societal needs to convict guilty person." *Id.* at 1155.

E.

In addition, David Christunas argues that the district court erred (1) in denying his motion to suppress evidence seized at his residence, and (2) in enhancing his base offense level by applying U.S.S.G. § 2D1.1(b). We disagree.

Christunas argues that the affidavit underlying the warrant failed to establish probable cause to search his residence. A reviewing court accords great deference to a lower court's independent determination of probable cause. *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983); *Massachusetts* v. *Upton*, 466 U.S. 727 (1984). This court will reverse such determinations only if they are clearly erroneous. *United States* v. *Williams*, 962 F.2d 1218 (6th Cir.), *cert. denied*, 113 S. Ct. 264 (1992). We find that the district court's holding that the affidavit adequately established probable cause is not clearly erroneous.

The evidence seized from David Christunas' residence included three firearms, a .357 Magnum revolver, a Beretta 6.35 caliber pistol and a Hopkins and Allen Arms revolver, which were found in a locked gun cabinet. In sentencing David Christunas, the district court adopted the government's recommendation to enhance

David Christunas' base offense level by two levels pursuant to U.S.S.G. § 2D1.1(b). That guideline provides that when calculating the base offense level for unlawful trafficking or possession of drugs, if a dangerous weapon, including a firearm was possessed, the base offense level is to be increased by 2 levels. U.S.S.G. § 2D1.1(b) (1993). Application Note 3 to this guideline explains that the enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet."

This court reviews the district court's finding of facts for clear error, but reviews application of the guidelines to those facts *de novo*. *United States* v. *Garner*, 940 F.2d 172, 174 (6th Cir. 1991). In deciding to enhance Christunas' sentence pursuant to U.S.S.G. § 2D1.1(b), the district court carefully weighed the testimony regarding the firearms and determined that the presence of the .357 Magnum revolver and the Beretta 6.35 caliber pistol with a clip loaded with eight live rounds was consistent with protection of either drugs or the proceeds of drug activities or funds to be utilized to purchase drugs. The district court was not clearly erroneous in its conclusion. We find that in the absence of a showing that it was clearly improbable that these weapons were connected with Christunas' drug trafficking activities, the district court's application of U.S.S.G. § 2D1.1(b) to enhance Christunas' sentence was appropriate.

F.

Kenneth Christunas raises several issues on appeal. We find that none of the issues warrant reversal of his conviction or sentence.

Ken Christunas argues that the district court erred in not disqualifying his defense counsel who had an actual conflict of interest. After full consideration, we find that

the circumstances of this case do not support this argument.

Ken Christunas' counsel, N.C. Deday LaRene, had an actual conflict of interest in that he had previously represented Susan Sancho and her husband Gary Sancho[4] in contesting a civil forfeiture of their home based on her husband's drug dealing. Susan Sancho was to be, and was, called as a government witness. LaRene brought the potential conflict to the attention of the court, initially pointing out that he would not be able to testify on Christunas' behalf with respect to Susan Sancho's testimony, unless he withdrew as Christunas' counsel. Christunas waived any claim of ineffective assistance of counsel based on LaRene's failure to withdraw as counsel.

We are persuaded by the well-reasoned opinion of the Seventh Circuit that has addressed this issue. In *United States* v. *Lowry*, 971 F.2d 55 (7th Cir. 1992), the court held that defendant had forfeited his claim that his attorney's actual conflicts of interest deprived him of effective assistance of counsel when he waived the conflicts in order to retain his attorney. *Id.* at 63. The court explained:

> This is not to say that Lowry's waiver completely bars any ineffective assistance claim, but it does bar any claim based on Schick's alleged conflicts of interest. To hold otherwise would be to render the waiver meaningless; a defendant would lose nothing by waiving his right and sticking with counsel who had a conflict, since he could always allege "ineffective assistance" if convicted. . . . We have no doubt that Lowry clearly understood the dangers of counsel with a conflict, his rights, and his options, and that he

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4 Gary Sancho was killed before the conclusion of the civil forfeiture proceedings.

> made a knowing and intelligent waiver. That choice is binding.

Id. at 63-64. We find it appropriate to apply this rationale to the instant case, and we hold that the district court did not err in accepting Christunas' waiver of his attorney's conflict of interest.[5]

After the government had presented its case-in-chief, Ken Christunas requested that the trial be bifurcated to that he could present a withdrawal defense. The district court denied the motion, basing its determination primarily on the grounds that Christunas had not satisfied the test of *United States* v. *Causey*. *See* 834 F.2d at 1287. Having carefully reviewed the record, we find that the district court did not abuse its discretion in making this determination.

Ken Christunas also argues that several evidentiary rulings of the judge and certain arguments of the prosecutor, injected error, caused prejudice, and warrant a new trial. We disagree.

Christunas argues that the district court erred in admitting certain hearsay statements as exceptions to hearsay under Federal Rule of Evidence 801(d)(2)(E) which allows statements offered against a party that

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5 We note that Christunas' efforts to argue that the holding of the Second Circuit in *United States* v. *Fulton*, 5 F.3d 605 (2d Cir. 1993), should apply to the instant case is misplaced. In that case, the court did hold that the defendant's waiver of his counsel's conflict of interest was invalid because the district court abused its discretion in not disqualifying trial counsel after the conflict became apparent. 5 F.3d at 612. In that case, however, the conflict that emerged was that defendant's co-conspirator, a government witness, testified that defendant's lead trial counsel had engaged with him in heroin trafficking. The court found that this allegation, which it treated for purposes of the constitutional analysis as true, revealed a *per se* violation of defendant's Sixth Amendment right to effective assistance of counsel. *Id.* In the instant case, however, the conflcit of interest is not a result of defense attorney's criminal involvement in defendant's criminal activities, and thus no *per se* violation is present.

were made by a co-conspirator of the party during the course and in furtherance of the conspiracy. Christunas argues that the contested statements were not made in furtherance of the conspiracy. This court reviews a district court's determination of whether proffered evidence constitutes hearsay *de novo*. *United States* v. *Levy*, 904 F.2d 1026, 1029 (6th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991). Upon review of the record, we agree with the district court's determination that the statements could be construed as being made in furtherance of the conspiracy. Furthermore, we note that even if the admission of these statements had been error, in light of all the evidence presented at trial, we find that such errors would have been harmless. *See* Fed. R. Crim. P. 52(a); *Murphy*, 763 F.2d at 209-10.

We further find that it was not an abuse of the district court's discretion to admit Christunas' tax returns into evidence, nor did certain statements in the prosecutor's closing arguments create prejudice warranting a new trial.

Ken Christunas properly made a motion under Federal Rule of Civil Procedure 29, seeking acquittal as to the criminal enterprise count against him on the ground that the government had failed to prove the essential element that Christunas occupied the requisite managerial position with respect to five or more persons, as alleged in the indictment. He appeals the district court's denial of his motion.

"It is well settled that the test to be applied by a trial court in determining a defendant's motion for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure is taking the evidence and inferences most favorably to the government, if there is such evidence therefrom to conclude that a reasonable mind might fairly find guilt beyond a reasonable doubt, the issue is for the jury." *United States* v. *Overmyer*, 867 F.3d 937, 938 (6th Cir.), *cert. denied*, 493 U.S. 813 (1989). "An appellate court, in reviewing the trial court's decision regarding a

Rule 29 motion, applies the same principles to the record it has before it." *Id.* Taking all the evidence in the light most favorable to the government and giving the government the benefit of all inferences that may be drawn from that evidence as this court is required to do, we find that there was sufficient evidence for the jury to convict Christunas of managing an criminal enterprise.

In sentencing Ken Christunas, the district court adopted the recommendation of the probation department and held Christunas responsible for 25,310 pounds of marijuana, resulting in a base offense level of 36. Christunas argues that his base offense level should have been set no higher than 34 because the evidence at trial demonstrated that the weight calculations relied upon by the district court were fatally flawed by the propensity of the witness, Robert Michaelson, to overestimate by a factor of approximately twenty per cent.

We review the district court's factual findings which underlie the application of a guideline provision for clear error. *United States* v. *Zimmer*, 14 F.3d 286, 289 (6th Cir. 1994); *Garner*, 940 F.2d at 174. The district court must determine the quantity of drugs attributable to a defendant by the preponderance of the evidence. *United States* v. *Moss*, 9 F.3d 543, 552 (6th Cir. 1993). Having reviewed the record, we find that the district court's findings of fact on this issue are not clearly erroneous, and its determinations are supported by a preponderance of the evidence.

III.

For the foregoing reasons, we AFFIRM the convictions and sentences of the four defendants.

ORDER GRANTING DEFENDANTS' REQUEST FOR A BIFURCATED TRIAL AND ORDER AFFIRMING MAGISTRATE'S FEBRUARY 19, 1993 ORDER DENYING MOTION FOR SEVERANCE

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated March 15, 1993)

(UNITED STATES OF AMERICA, Plaintiff, v. JAMES CHRISTUNAS and ARTHUR BRAYMAN, Defendants — CASE NO. 92-80338; HONORABLE PAUL V. GADOLA)

The court has reviewed the magistrate's February 19, 1993 order denying the motion of defendants James Christunas and Arthur Brayman requesting severance from the trials of Kenneth Christunas, David Christunas, Robert Johnson and Herbert Micou and the pleadings appealing therefrom. The court finds that the magistrate's ruling is not clearly erroneous. Therefore, the order shall be affirmed.

The magistrate's February 19, 1993 ruling also recommends that upon motion by defendants James Christunas and Arthur Brayman, this court should allow a bifurcated trial:

> At such time as the prosecution rests, defendants Kenneth Christunas, David Christunas, Robert Johnson and Herbert Micou would be invited to put forward any proofs that these four defendants choose to present. After these defendants have rested, and the government has been given its chance to present rebuttal evidence, the jury would be instructed and final arguments would be presented regarding the guilt or innocence of these four defendants only. Following the return of jury verdicts with regard to these four defendants, the Court would reconvene the trial before the same jury panel and permit

> defendants James Christunas and Arthur Brayman to present their proofs. This would give these two defendants an opportunity to secure the possibly favorable testimony of defendant Kenneth Christunas.

Magistrate's Opinion and Order, at 3-4.

In their objections to the magistrate's February 19, 1993 order, defendants James Christunas and Arthur Brayman request that, in the event the court affirms the magistrate's order denying severance, the court adopt the magistrate's recommendation of bifurcation. In its response to the defendants' objections, the Government argues that bifurcation would be unduly burdensome, especially because the trial, as it is presently planned, will already be bifurcated between the issue of defendants' guilt and the issue of *in rem* forfeiture of certain property of defendants. The court finds that bifurcation, or rather "trifurcation" (as such will result) of this trial, as suggested by the magistrate, would not be unduly burdensome or confusing to the jury.

In *U.S.* v. *Joshi*, 896 F.2d 1303, 1306-09 (11th Cir. 1990), the United States Court of Appeals for the Eleventh Circuit held that birfurcation of a criminal trial for the purpose of allowing the guilt of certain defendants to be decided upon by the jury before the jury heard the damaging testimony of a co-defendant testifying in his own defense, is not improper. In *Joshi*, as in the case at hand, the trial court denied a motion for severance and then acceded to the request of defense counsel to proceed with a bifurcated trial.

Rule 14 of the Fed. R. Crim. Pro. recognizes that joinder, even when proper under Rule 8(b), may prejudice either a defendant or the Government. Thus, the rule provides:

> [i]f it appears that a defendant or the government is prejudiced by a joinder of . . . defendants . . . for trial together, the court may order an

> election of separate trials of counts, grant a severance of defendants or *provide whatever other relief justice requires.*

Fed. R. Civ. Pro. 14 (emphasis added). Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts. *Zafiro* v. *U.S.*, 113 S.Ct. 933, 939 (1993). Mutually antagonistic defenses are not prejudicial *per se*. *Id.* at 938. Even if they were, "Rule 14 does not *require* severance merely because some prejudice is shown; rather, it leaves the *tailoring of the relief* to be granted, if any, to the district court's sound discretion." *Id.* at 938 (emphasis added).

In the case at hand, the court is faced with co-defendants who are to one another close family relations. The assertion of the affirmative defense of withdrawal from the conspiracy on the part of James Christunas and Arthur Brayman will, without severance or bifurcation, result in these defendants aiding the prosecution in its case against their brother and relative, Kenneth Christunas. Kenneth Christunas has indicated a willingness to testify in the second half of a birfurcated proceeding at which the guilt of his brother James Christunas and his relative, Arthur Brayman, would be at issue; testifying in a non-bifurcated proceeding on behalf of these defendants as to their withdrawal, could require Kenneth Christunas to incriminate himself before the jury by admitting that a conspiracy did indeed exist.

In addition to the court's concern that the defendants might, by virtue of their close family relation to one another, be unduly pressured either into testifying or not testifying, the court finds that this is a complex case involving markedly different degrees of culpability and that therefore the risk of prejudice is further heightened. *Zafiro*, 133 S.Ct. at 938. Defendants James Christunas and Arthur Brayman are facing a single

count of conspiracy to distribute marijuana whereas defendant Kenneth Christunas is facing seven counts, including conspiracy to import marijuana from outside the United States and engaging in a continuing criminal enterprise. Thus, the evidence presented against Kenneth Christunas will be substantially greater than the evidence presented against James Christunas and Arthur Brayman, and it will subject Kenneth Christunas to the possibility of much greater punishment.

For the foregoing reasons and because the court can identify no prejudice that will inure to the Government as a result of bifurcation (or trifurcation), the court will grant defendants' request to bifurcate as per the magistrate's February 19, 1993 order. Per the Government's request, the jury will be duly informed and instructed, prior to the commencement of the presentation of evidence, as to the details of the trifurcated proceeding.

Therefore, it is hereby ORDERED that the magistrate's February 19, 1993 order denying defendants' motion for severance is AFFIRMED.

It is further ORDERED that the magistrate's recommendation that upon motion of defendants, a bifurcated (and in effect, a trifurcated) trial be conducted and is hereby ADOPTED as per the magistrate's order, and defendants' motion pursuant thereto is hereby GRANTED.

SO ORDERED.

/s/ PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

Dated: 3/15/93

EXCERPTS FROM TRANSCRIPT OF JURY TRIAL

(United States District Court —
Eastern District of Michigan —
Southern Division)

(UNITED STATES OF AMERICA, Plaintiff, v. CHRISTUNAS, *ET AL.*, Defendants — No. 92-80338; Hon. Paul V. Gadola)

DISCUSSION REGARDING SUSAN SANCHO
[TRANSCRIPT VOLUME I, PROCEEDINGS OF MARCH 15, 1993]

(241) * * * MR. LARENE: Judge, there is a — a matter that we probably should take up before we start with the jury tomorrow morning: Sue Sancho — if we're going to reach Sue Sancho and Larry Zakalowski tomorrow.

THE COURT: What —

MR. LARENE: Is that right, Mr. Cares? You expect to?

MR. CARES: Expecting.

MR. LARENE: Yes. Then I think we should take something up with the Court in the morning before court, so whatever is convenient — eight o'clock?

UNIDENTIFIED ATTORNEY: Oh, no. Eight?

THE COURT: Well, I'm here by that time.

MR. LARENE: Well, it doesn't have anything to do with anyone else. What — I used to represent — I represented Gary Sancho, and I represented Sue Sancho, who will be a witness. Gary Sancho will not be a witness, and I think we need to make — for everybody's sake — but it really doesn't affect any other counsel — well, Mr. Howard it does (242) because he worked for Stan and Larry Zakalowski — the — the clients are prepared to waive any potential conflict, and I'm prepared to make representations about what I will not cross-examine about.

THE COURT: Well, can't you put it on the record?

MR. LARENE: Oh, I can now. I just thought you wanted to leave.

THE COURT: Right now if you've got — if you can do it in the next five minutes.

MR. LaRENE: I can barely say my name in five minutes, but years ago I represented Gary Sancho.

THE COURT: You know yourself better than I.

MR. LaRENE: I've known myself longer.

I represented Gary Sancho and his — in a criminal investigation back in the mid to — the mid-eighties when he was arrested in 1988 in Monroe.

I don't have a problem with the witness being excused. I mean, this has nothing to do with him.

THE COURT: You — Mr. Ogle, you can step down from the witness stand. Remember you shouldn't discuss your testimony with anybody because you're right in the midst of — of it at this point, so —

THE WITNESS: Yes, sir.

THE COURT: — don't have any conversations with anyone at all about your testimony.

(243) THE WITNESS: Yes, sir.

THE COURT: Just come back to court tomorrow and continue.

(Witness excused at 4:25 p.m.)

MR. LaRENE: When Mr. Sancho and Mr. Zakalowski were arrested under circumstances that will come out tomorrow, I believe that Juan Mateo represented Gary Sancho in the state criminal proceedings and Jim Howarth — we all share office space — represented Larry Zakalowski. As a result of the arrest and investigation, there was a civil forfeiture — federal civil forfeiture action instituted against the — the marital home of Gary Sancho and Susan Sancho in which I represented both of them.

I filed on their behalf, among other things, a — an Answer and affirmative defenses in which it was alleged by Ms. — on behalf of Susan Sancho that she was an innocent spouse: that is, that she had no knowledge of Gary Sancho's drug trafficking activities.

I — subsequently Gary Sancho was murdered. I worked a settlement of the forfeiture case out in which

the federal government agreed to pay Mrs. Sancho — I believe it was 30 or $35,000 representing her — her —

THE COURT: Her equity in the house?

MR. LaRENE: — her equity in the house —

THE COURT: Okay.

(244) MR. LaRENE: — and at one point almost immediately after Gary Sancho's death, Susan Sancho said to me — and not in a privileged conversation because there were other persons with whom I did not have an attorney/client relationship present — that she believed that one of three people was — were responsible for her husband's death. One of those people was Ken Christunas.

I should add — and just so that they're not — so we all understand that Ken Christunas has since taken and passed a polygraph on his lack of involvement or knowledge of — or in any of [*sic*] way of Gary Sancho's death, and that has been —

MR. CARES: I don't know what — I don't know what —

MR. LaRENE: Well, that's been — Judge, that's not coming before the jury.

THE COURT: Okay.

MR. LaRENE: I think you know it. Mr. — Mr. Cares has a copy of the report.

I just want that clear.

THE COURT: All right. So she made this comment to you that she —

MR. LaRENE: Right. She — she's — all right. That —

THE COURT: — suspected that —

(245) MR. LaRENE: Yes.

THE COURT: — Mr. Kenneth Christunas was involved –

MR. LaRENE: Right.

THE COURT: — in her husband's death. All right.

MR. LaRENE: I — I could —

THE COURT: So —

MR. LaRENE: — conceivably cross-examine her, although I do not intend to — cross-examine her about her motive — potential motive or bias against Ken Christunas based on her at least one-time belief that she was

— that he might have been responsible for or involved in her husband's death. I'm not going to do that.

I'm also not going to make myself available as a witness.

THE COURT: Is anybody going to do that?

MR. LaRENE: No. No, sir.

THE COURT: I'm looking at all of defense counsel.

MR. LaRENE: In — in addition —

THE COURT: The subject isn't going to come up at all, then, right?

MR. LaRENE: That is not, but because — one of the reasons that — one of the reasons that it's not is because I don't want to make myself a witness. There are other tactical considerations there, in addition to which I do propose to ask (246) her about her making a claim at being an innocent spouse. However, again I do not — I will — I do not want to frame that inquiry in such a way as to make myself a witness, and again I will not make myself a witness if she denies that. Because Ken Christunas has the right to have me as a witness as well as the right to have me as a lawyer, he has chosen he would rather have me as a lawyer than as a witness, and he waives any claim that he might have to later assert that I was ineffective in my representation of him because I did not withdraw.

THE COURT: Are you talking about her — about the possibility of cross-examining her as to whether she was really an innocent spouse? I don't —

MR. LaRENE: Well, if she — sure. Her statement — her statement to her attorney —

THE COURT: You were the attorney that took that position on her part, were you not?

MR. LaRENE: Based on her —

THE COURT: Got her a $35,000 settlement with the government —

MR. LaRENE: Based on her representation.

THE COURT: — on the basis that she was — on the basis that she had at least a — a substantive or substantial argument that she was in fact —

MR. LARENE: That's right.

(247) THE COURT: — innocent.

MR. LARENE: That's right.

THE COURT: All right.

MR. LARENE: I would cross-examine —

THE COURT: Well —

MR. LARENE: — her about that in this as — on the basis of the — of the public record — I mean, if the Court will let me, on the basis of the public record that she — that the claim or answer that was filed on her behalf as an — as a party in a lawsuit.

If she denies that or if she says that wasn't — she never said that — it was just something that was written — I — I could otherwise perhaps appear as a witness or give testimony that she did in fact say that; she did in fact direct that to be said on her behalf; she did in fact claim she had no knowledge of Gary Sancho's —

THE COURT: Well, she didn't say it, apparently. She filed pleadings to that effect, didn't she?

MR. LARENE: Yes, sir.

THE COURT: Well —

MR. LARENE: All I'm saying is — okay. Well —

THE COURT: I don't —

MR. LARENE: The government had raised some questions.

THE COURT: What do you expect me to do? I'm not sure, (248) Mr. LaRene —

MR. LARENE: Well, what I expect —

THE COURT: — I'm just not sure what — what it is you're proposing to do when Mrs. Sancho gets on the witness stand and — as a government witness here.

MR. LARENE: I'm proposing, among other things, to say that the — to answer questions about the — the filing of the lawsuit, that a lawsuit was filed against the home, that she defended that lawsuit on the basis that she didn't know anything about Gary Sancho's —

THE COURT: Oh.

THE COURT: — drug trafficking. That's all.

I'm not going to ask her what she said to me or anything like that, although I could if I were not the lawyer —

THE COURT: All right.

MR. LaRENE: — if I were not Ken Christunas's —

THE COURT: All right, Mr. Cares, what's your position on that? Assuming that that's the extent of it, that — that she has filed pleadings that — in which she maintains that she had, at least at that time, no knowledge of her late husband's involvement in illegal drug trafficking?

MR. CARES: If in fact she is responsible for the pleadings — and I — I guess I would have to see the pleadings because this could — this could — Mr. LaRene could (249) be treading on treacherous ground here because through the course of questioning, it may become apparent that there was representation — through his questioning of her, it may become apparent that he is attacking her credibility personally.

MR. LaRENE: That's exactly what I do not want to do, and I understand the treacherous ground. That's why I'm talking to the Court now, because — for two reasons: one, because I — I want the Court to be aware that this is coming and also because to the extent that I have to pull back from my cross-examination about the — of the woman or to not make myself a witness or to not make myself — my — put my credibility in issue, I may be doing less cross-examination that I would under other circumstances, and I discussed this with Ken Christunas. He understands that I'm — I'm — I have to hold back in order to not do something improper and not make myself a witness in a case in which I am the lawyer, and I — I thought I was — I was in part responding to concerns voiced by government counsel, that we have a record in which it's clear, so that should there be — in the unlikely event there should be a conviction, no one can later say that I was — I was somehow ineffective or — or less than diligent in my duty to Mr. Christunas in not withdrawing in the case so I could testify as — or be available to testify as a witness against this woman's testimony. That's all.

(250) THE COURT: Mr. Cares?

MR. CARES: I think I understand now. I think — I think he is having his client Ken Christunas waive any potential conflict of interest, and if that's his intent, then I agree that's proper.

THE COURT: All right. Would you inquire of Mr. —

MR. LaRENE: Well — Mr. Christunas, would you stand up?

You understand that — I — I hope you know me well enough to understand what we're talking about even if no one else does.

DEFENDANT K. CHRISTUNAS: Yes, I understand.

MR. LaRENE: And you understand that there's — that I cannot put myself in the position — because I'm your lawyer, I can't put myself in a position where I am acting or inserting myself as a witness regarding the testimony of Susan Sancho.

DEFENDANT K. CHRISTUNAS: Yes, I understand.

MR. LaRENE: And I have explained that to you and told you I would quit the case and be your — and not be your lawyer but rather be your witness, and you said, for some reason, you'd rather have me as your lawyer.

DEFENDANT K. CHRISTUNAS: Yes, I did.

THE COURT: That indeed is your position even though —

(251) DEFENDANT K. CHRISTUNAS: That is my position.

THE COURT: — that — that, of course, mandates that — that Mr. LaRene will not be in a position then to establish that, in effect — that Mrs. Sancho made some false representations to the Court concerning her knowledge.

DEFENDANT K. CHRISTUNAS: Yes, sir.

THE COURT: All right.

MR. LaRENE: I still intend to attempt a cross-examination.

THE COURT: Yes.

MR. LaRENE: That's all I wanted to —

THE COURT: All right. All right. That apparently clarifies the matter and settles it.

Anything further?

All right. We'll see you at 8:30 tomorrow morning, then.

* * *

DISCUSSION REGARDING SUSAN SANCHO

[TRANSCRIPT VOLUME II, PROCEEDINGS OF MARCH 16, 1993]

(5) * * * THE COURT: I have a preliminary inquiry. Of course, we're involved now in the cross-examination of Mr. Ogle. At what point in the proceedings does the government proposed to call Mrs. Sancho to the stand?

MR. CARES: Depending on — depending on how things progress today, the government would call her today. She will be available for testimony today, but it's hard to tell how quickly we're going to move along.

THE COURT: All right. I've got a memorandum that was furnished to me. After our session yesterday, I had some unresolved questions in my mind concerning the — the situation as exists with Mr. LaRene having previously been her legal counsel, and Ms. Elliott, my law clerk, did some research on the matter last night, and she has just handed to (6) me a memorandum and copies of a number of cases that she felt dealt with this particular situation. I have not had an opportunity to review those materials as yet, but just my cursory glance at the memo indicates that — at least my law clerk thinks that there are still some remaining problems, so I just wanted to make sure that we had an opportunity to fully address that whole situation before Mrs. Sancho was called to the witness stand.

MR. LARENE: Is that the *Garcia* line of cases dealing with —

THE COURT: I don't know. I've just got it right here.

MR. LARENE: I'm sorry. Yes.

THE COURT: Well, she cites a *U.S.* v. *Falzone* or *Falzone* case, 766 Federal Supplement 1265 from the Western District of New York; *U.S.* v. *Curcio*, 680 F.2d 881, from the Second Circuit, 1982; and she also makes some reference to the Code of Professional Responsibility, Canons 4 and 9.

The case you mentioned —

MR. LaRENE: *Garcia* is a Fifth Circuit Case. It's — it's — I believe it probably is mentioned in *Curcio*. If not, I'll get it.

We can talk about it now, or we can talk about it later, as the Court chooses.

THE COURT: Well, let's not delay the —

(7) MR. LaRENE: Fine.

THE COURT: — the jury, but I just wanted to mention to you that I want to go into that matter before —

MR. LaRENE: Yes, sir.

THE COURT: — Mrs. Sancho comes to the witness stand.

MR. LaRENE: Yes, sir.

THE COURT: Are we ready to proceed?

* * *

DISCUSSION REGARDING SUSAN SANCHO

[TRANSCRIPT VOLUME II, PROCEEDINGS OF MARCH 16, 1993]

-SEPARATE RECORD-
(Jury not present)

(234) * * * COURT RECORDER: Court is now reconvened. Please be seated.

THE COURT: All right. Counsel for all the parties are present. The jury has been excused for the day, and we'll take up the matter of — the procedural matter regarding the proposed testimony of Mrs. — is it Susan Sancho?

MR. CARES: Yes. In fact, Susan Sancho is in the courtroom right not.

THE COURT: All right.

MR. HOWARD: Your Honor?

THE COURT: Yes.

MR. HOWARD: Before we proceed, I represent Robert Johnson, and we're not involved in this in any way. If we so desire, may we be excused? It's just all of the issues in no way bear on — on — in our case.

THE COURT: Well, I would prefer that everybody remain in the courtroom until we get this — I don't know exactly where this is going —

MR. HOWARD: Fine, Judge.

(235) THE COURT: — and I would prefer that everybody remain.

MR. CARES: At this point, should I call her as a witness?

THE COURT: Yes.

MR. CARES: Would you stand right there, and the Judge will administer the oath?

THE COURT: Mrs. Sancho, will you raise your right hand?

SUSAN SANCHO, Government's Witness, sworn.

THE COURT: Please take the witness stand.

Direct Examination

BY MR. CARES:

Q. Would you please state your name and spell it?

A. Susan Sancho. S-u-n — S-u-s-a-n S-a-n-c-h-o.

Q. Okay. At one time, were you married to Gary Sancho?

A. Yes, I was.

Q. And was Gary Sancho arrested sometime in March of 1988?

A. I believe so.

Q. In March of 1988, were you and Gary Sancho living at a house located on Wahrman Street?

A. Yes, we were.

Q. That was in Romulus?

A. Yes.

Q. After Gary's arrest, were certain legal actions instituted (236) in which the government was attempting to forefeit your house?

A. Yes.

Q. In that forfeiture proceeding, were you a party?

A. I don't understand what you mean.

Q. Had you — who — who owned the house?

A. Gary and I.

Q. You owned it together. Is that right? Is that a "yes"?

A. Yes.

Q. In this forfeiture action, did you and your husband consult an attorney?

A. My husband did have an attorney.

Q. Okay. Who was your husband's attorney?

A. Deday LaRene.

Q. Did you have an attorney?

A. I didn't think I need [*sic*] one, but I guess it would be Deday LaRene.

Q. Okay. This forfeiture action, did you talk with any attorney about your position — you, Susan Sancho, your position concerning your house? Did you talk with an attorney about that at all?

A. No.

Q. Did you talk with Mr. LaRene about it at all?

A. Gary did, you know, talked the most because he always (237) took care of everything.

Q. Okay. You said Gary talked the most. Were you present when Gary talked with the attorney?

A. Sometimes. Yeah, most of the time.

Q. So most of the time, you were present when Gary talked to the attorney? Is that a "yes"?

A. Yes.

Q. And in these discussions with the attorney, did you feel that you were represented by Mr. LaRene as well as Gary?

A. I wasn't arrested, but I don't know.

Q. But you knew or you believed that the government was trying to forfeit the house that you and Gary owned. Is that correct?

A. Yes.

Q. Okay. Just in terms of the forfeiture, did you feel that you were represented by Mr. LaRene?

A. I guess so.

Q. And in these meetings that — in which you — at which you were present, did you make any statement to Mr. LaRene about the forfeiture of your house?

A. Not that I recall except for after Gary died.

Q. After Gary died, what?

A. You know, after Gary was — you know, after Gary died, then, you know, the house was up in the air, and so that's — I don't know how to explain it to you.

(238) Q. So after Gary died, did you talk with Mr. LaRene about the forfeiture proceedings?

A. I asked him what was going on with the house.

Q. Okay. Did you feel that he was your attorney at that time?

A. Yes, I guess.

Q. Was there ultimately a settlement in which you got your house back or at least got some money back for your house?

A. Yes.

Q. What was the settlement?

A. I think it was 30,000 or something like that.

Q. Were you aware that certain legal papers were filed on your behalf in this forfeiture proceeding?

A. I don't know.

Q. Were you shown any legal papers by anyone?

A. Not that I can recall.

Q. Would you be willing to have Mr. LaRene question you about the meetings at which you were present when the forfeiture of your house was discussed?

A. It's been a long time, so I don't really remember that much.

Q. Okay. The question is would you be willing to have Mr. LaRene question you about those meetings.

A. No.

MR. CARES: Your Honor, I'm not sure where to go (239) from here. Perhaps the Court has some questions.

THE COURT: Well, she's — I think that Mrs. Sancho has indicated to the Court's satisfaction that she considered you, Mr. LaRene, to be her attorney at the time of these forfeiture proceedings. Although apparently it was her husband Gary who retained you, it would appear that the house was — well, certainly at least she had a dower interest and probably was a joint owner of the — of the real estate or an owner by — tenant by entireties —

MR. LaRENE: There were — there was an issue —

THE COURT: — of the real estate.

MR. LaRENE: There was an issue about that that was involved in the forfeiture proceeding —

COURT RECORDER: Get to the microphone, please.

MR. LaRENE: — but it was clear to me that I was acting as Mrs. Sancho's lawyer in connection with the forfeiture proceeding.

THE COURT: So there's no question in your mind either —

MR. LaRENE: No question at all.

THE COURT: — that you were not only Mr. Sancho's attorney in the forfeiture proceeding but also Mrs. Sancho's attorney.

MR. LaRENE: No question at all.

THE COURT: All right. And I take in the course of (240) those proceedings, you filed certain pleadings —

MR. LaRENE: Yes, I did.

THE COURT: — which you prepared and —

MR. LaRENE: After discussions with Mr. and Mrs. Sancho —

THE COURT: All right.

MR. LaRENE: — and I ultimately resolved the case after discussions first with Mr. and Mrs. Sancho and then, after Mr. Sancho's death, with Mrs. Sancho.

THE COURT: The case was concluded sometime after Mr. Sancho's demise, I take it.

MR. LaRENE: That's correct.

THE COURT: All right. And ultimately there was a settlement reached with the government in that — in that

forfeiture action, and I take it from the testimony here and also on the representations which were made here in court yesterday, Mrs. Sancho received from the government a — a cash settlement representing her equity or at least to satisfy her claims to an equity in the — in the house, and it's been variously indicated that the settlement was 30,000 or $35,000.

MR. LaRENE: It was either thirty or $33,000.

THE COURT: Thirty or $33,000.

MR. LaRENE: Yes.

THE COURT: All right. Now Mrs. Sancho has indicated to us here today on the witness stand that she's not (241) willing to have you cross-examine her regarding the — the matters that you discussed with her and the — and the work that you did with her in that forfeiture action.

MR. LaRENE: I understand that.

THE COURT: All right.

MR. LaRENE: I —

THE COURT: So the situation is, it seems to me — it seems to me clear that you're in a — it seems to me that you're in a position where — you really are not in a position to cross-examine her regarding those matters that were — information that you obtained and the contacts and the communications that you had with her during the handling of her legal business.

MR. LaRENE: I agree.

THE COURT: You agree with that.

MR. LaRENE: Yes.

THE COURT: All right. And yesterday it was indicated, I think, in court that — that — that Mr. — your client Mr. —

MR. LaRENE: Christunas.

THE COURT: — Christunas preferred to have you as his lawyer rather than as your witness, but it seems to me again that under the circumstances, you could not be a witness in any event.

MR. LaRENE: I could not be a witness so — well, I (242) could not be a witness in any event.

THE COURT: Because of the position —

MR. LaRENE: That's correct.

THE COURT: — taken by Mrs. Sancho, and —

MR. LaRENE: That is correct.

THE COURT: — Mr. — Mr. Christunas has indicated that it's all right with him — I'm going to ask him some more questions about this in due course, but he's indicated that it's — that it's all right with him if you were not a witness —

MR. LaRENE: There — there are —

THE COURT: — regarding the matters of your dealing with Mrs. — Mrs. Sancho, and however, I just conclude that you couldn't be a witness anyway.

MR. LaRENE: Judge, there are — as I indicated to you in court yesterday, there were conversations that I had with both Mr. Sancho, Mrs. Sancho and the two of them together in which other persons were present, and without going into the detail of any of those conversations, I would think that because of the presence of third parties, they would not be — they would not be privileged. However, I think that's the area in which Mr. Christunas was waiving my availability, if you will, as a witness.

THE COURT: Well, I don't know whether that would be barred or not, but it just seems to me that it's a very —

(243) MR. LaRENE: Yes, sir.

THE COURT: — it's a very tenuous situation here —

MR. LaRENE: Absolutely.

THE COURT: — whether other people were present or not because of the fact that you were acting as her legal counsel at that time in a matter contested between herself and — and the United States government.

MR. LaRENE: I — I understand that, and I do not propose to make any inquiry touching upon my conversations with her, whether I think they were privileged or not.

THE COURT: All right. Well, let me just — I suppose we ought to ascertain — assuming that — what would be

your intention, then, regarding your cross-examination of Mrs. Sancho?

MR. LaRENE: To be gentle.

THE COURT: Well, I understand that.

MR. LaRENE: That's not what you meant, I know.

I — I think, given the — what Mrs. Sancho has said today, that there is probably no way in which I can explore the matter of the filing of the claim and affirmative defense which is —

THE COURT: I think — that's my conclusion.

MR. LaRENE: Yes. I —

THE COURT: I read the — the cases that — that Ms. Elliott found, and it seems to me that they're — they're (244) rather compelling. They're not, either one of them, from this district or from this circuit, but they seem to indicate that there is a serious problem here and that —

MR. LaRENE: What I had originally proposed to do by way of an inquiry would be to have asked Mrs. Sancho the same questions that I would have asked any witness whose lawyer had filed a document on her behalf and to avoid — to avoid the issue of who the lawyer was that signed the document or filed the document on her behalf. My thought was that I would —

THE COURT: Okay. Before we get into that, it seems to me we ought to know what — what the questions are that —

MR. LaRENE: Well —

THE COURT: — you would have proposed to put to here.

MR. LaRENE: May I have the document?

I think given her answers today, I probably cannot — I probably can't formulate any meaningful questions, but if the Court will, I would hand — I'll hand up the — or I can just — maybe it's better if I recite for the record what the —

THE COURT: All right.

MR. LaRENE: The complaint for forfeiture was filed against the premises on Wahrman Road. It alleges — the complaint alleges in paragraph three — I'm — I quote:

"That on or about March 15, 1988, the defendant Real (245) Property was used or intended to be used to facilitate violations of Title 21, U.S. Code. This property was used to store and facilitate the unlawful distribution of a controlled substance, marijuana and hashish, and is forfeitable under title 21, U.S.C., Section 881(a)(7).

"By way of example, on March 15, 1988, agents of the Drug Enforcement Administration and officers of the downriver area narcotics organization in an undercover capacity made a controlled buy of 32 pounds of marijuana taken from the defendant property by Gary Sancho. Gary Sancho was subsequently arrested and agreed to a consent search of the defendant residence. Upon executing the search warrant at the defendant residence, agents found marijuana and hashish."

In the Answer to Complaint filed on behalf of Mr. and Mrs. Sancho, the claimants to the property, I signed — I signed the Answer, and paragraph three thereof states:

"Claimants deny the allegations of paragraph three of Plaintiff's complaint for the reason that they are not true."

And I further signed as attorney for the claimants Affirmative Defense of Susan L. Sancho which reads as follows:

"Further, claimant Susan L. Sancho asserts as an (246) affirmative defense that forfeiture of this real property of which she is a tenant in the entireties would be improper and in violation of rights secured to her by the Fifth Amendment to the United States Constitution for the reason that the complaint herein does not allege nor will the government be able to show nor is it indeed — nor is it indeed a fact that she was in any way involved in or aware of any of the allegedly unlawful activity upon which this forfeiture is premised or that she countenanced or consented to any such alleged activity."

I think given Mrs. Sancho's statements today that she really didn't know what was being filed on her behalf — and I can't effectively cross-examine her about the document without — without running afoul of the — of the claim of privilege.

THE COURT: I believe that's true. I think it's pretty clear that — that were you to get into that matter of — in an attempt on cross-examination to show that she had at one time at least taken a position at a time she was represented by you — she had adopted a position at that point that she knew nothing about any narcotics dealing by her husband and then presumably here now gives some testimony of a different character, I think you'd be in a — really an impossible situation.

MR. LaRENE: I think it would —

(247) THE COURT: I don't think it would be at all even remotely permissible for you to go into that matter with her.

MR. LaRENE: It — it might — now — well, I think it may also require a skill greater than I possess, frankly, to walk between those raindrops.

THE COURT: All right. Now, that leaves — that leaves — that leaves Mr. Christunas' situation that I want to — I think that we need to enlarge on a little more fully in light of the language of the cases that I've cited to you and which I presume by now you've examined.

MR. LaRENE: Hm-hmm. Yes, sir.

THE COURT: Mr. Cares, you're on your feet. Do you have something you —

MR. CARES: May — may this witness be excused?

THE COURT: Yes.

I don't think there's any reason that you need to stay in the courtroom now. Thank you very kindly, Mrs. Sancho.

And I assume that you'll notify her when she's to return to court, then, right?

MS. TODD: Right.

THE COURT: All right.

(Witness excused at 4:17 p.m.)

THE COURT: All right. Are we ready to — to proceed a little further here, then, at this point?

(248) MR. LaRENE: I suppose.

THE COURT: All right. I'm going to address your client at this time, Mr. Kenneth Christunas.

Mr. Christunas, you were here yesterday, of course, when this matter initially came up, and you've been here during the colloquy that we've had here in court with — with Mrs. Sancho, and also you've heard the comments made by your attorney Mr. LaRene, correct?

DEFENDANT K. CHRISTUNAS: Yes.

THE COURT: So you're fully aware of the situation that exists.

I just want to advise you, of course, that you do have the absolute right during the course of this trial to separate and conflict-free representation. Do you understand that, sir?

DEFENDANT K. CHRISTUNAS: Yes.

THE COURT: Now, I want to just indicate to you that there is a problem here ~~in~~ that your attorney, Mr. LaRene has taken the position and I think properly so that he cannot — he cannot cross-examine Mrs. Sancho regarding a position that she may have taken and apparently did take in the forfeiture action involving her home, a position that she was unaware of any involvement of Mr. Sancho in any narcotics trafficking activities. Now, I assume she's here as a government witness (249) because she's going to testify to some knowledge of his activities in that regard. Your attorney is in the position where he cannot pursue that — that matter with her. Do you full [*sic*] understand that, sir?

DEFENDANT K. CHRISTUNAS: Yes.

THE COURT: So if he continues as your legal counsel, then because of that conflict — that is, the conflict that he has between his position as your defense counsel in this trial and his position as the — as the attorney who counseled and advised and represented Mrs. Sancho in the forfeiture proceedings brought against her and the property by the government — you really will not have the advan-

tage of his ability to cross-examine her regarding what may be a — an inconsistent position that she takes now as compared with the position she took in the forfeiture action. Do you understand that, sir?

DEFENDANT K. CHRISTUNAS: Yes.

THE COURT: So — and as I have previously told you, you do have the absolute right to — to separate and conflict-free representation, and there is, therefore, the problem that arises. It's a problem that's inherent in your being represented by an attorney who — and I don't say this in a critical manner, but an attorney that because of the situation that's arisen has divided responsibilities or divided loyalties. In other words, he has a responsibility to Mrs. Sancho (250) as his client in that matter and a responsibility which does not end now merely because the forfeiture proceeding is over, and he also has a responsibility that he owes to you — a heavy responsibility he owes to you as your defense counsel in — in these criminal proceedings. Do you understand that fully, sir?

DEFENDANT K. CHRISTUNAS: Yes, sir..

THE COURT: All right. Now, I — have you had the opportunity to — to confer thoroughly with — with Mr. LaRene concerning this entire problem?

DEFENDANT K. CHRISTUNAS: No, sir.

THE COURT: You have not.

DEFENDANT K. CHRISTUNAS: No, sir.

THE COURT: All right. Is it your desire to — to have that opportunity to fully and thoroughly consult with Mr. LaRene concerning this problem?

DEFENDANT K. CHRISTUNAS: Yes, sir.

THE COURT: All right. Well, I want to give you that opportunity. I also want to encourage you to seek advice from independent counsel regarding this matter, and I want to also allow you a reasonable time to make your decision as to whether you want to have Mr. LaRene continue to represent you under the restrictions in his representation that are now apparent. Do you understand that, sir?

DEFENDANT K. CHRISTUNAS: Yes, sir.

(251) THE COURT: All right. So I am encouraging you to, first of all — to consult with independent counsel. I am also encouraging you to — to take the time to fully and thoroughly review the matter with Mr. LaRene as well, and I want to give you a reasonable period of time to reach a decision as to how you want to proceed in this matter, and we do not have a session scheduled in this trial for tomorrow: that is, for Wednesday, March the 17th. We're going to convene again on March the 18th at 8:30 in the morning. Do you believe that in the interim, between now, 4:20 p.m. on Tuesday, March 16th and 8:30 in the morning on March the 18th, you'll have sufficient time to consult with independent counsel and to fully and thoroughly discuss and review this matter with Mr. LaRene and — and make your determination?

DEFENDANT K. CHRISTUNAS: Yes, sir.

THE COURT: All right. Well, I think that will be the best course for us to follow under these unusual circumstances.

MR. LaRENE: Yes, sir.

THE COURT: All right. Any — anybody else have anything else to add on the record at this point?

MR. CARES: Not as to this issue, but there's a sort of corollary with Mr. Howarth, and I don't know — I don't — it's not nearly as sticky. In fact, I don't even know that it's sticky at all.

(252) Agent Lawrence Zakalowski will be testifying, who at one point was represented by Mr. Howarth. I don't know — I don't anticipate that Mr. Zakalowski will offer any testimony against Mr. Howarth's current client. If there's anything that needs to be — be resolved in that respect, Mr. Zakalowski is here. I don't know that we need a waiver. Maybe we could err on the side of caution.

THE COURT: Well, all right. If he's here, I guess we'd better go into that matter as well.

(Pause in proceedings at 4:24 p.m.)

MR. LaRENE: May — while we're — we have a moment —

THE COURT: Go ahead.

MR. LaRENE: — we were just having a conversation here, and it seems to me, based on my rudimentary knowledge of the case law, that one of the options that may be available is to have another lawyer come in to represent Mr. Christunas for purposes of cross-examination of Mrs. Sancho so that — if — if — if Mrs. Sancho is to be cross-examined regarding the pleading in question. I'm not asking for a ruling on that at this point. I'm just offering that as one thing that — that we're thinking about.

It strikes me, however, that — it seems almost inevitable that if anyone cross-examines her about the position taken in the pleading given her answers, that the (253) pleading, if it's to be admitted, would be admitted as a representative admission or statement or — and it would — the jury would learn, I would think, unless — well, would learn in the course of that, that I had in fact represented her and Gary Sancho.

So as I say, I'm not asking for a ruling. I thought I might — rather than springing it on you —

THE COURT: Well, we've still got that situation because, of course, we've got all these other attorneys, and —

MR. LaRENE: Yes. Well, the thing — my —

THE COURT: I have no idea what the substance —

MR. LaRENE: The only other —

THE COURT: — of her testimony is or —

MR. LaRENE: Yes.

THE COURT: — or which — which, if any, of these defendants are — well, obviously —

MR. LaRENE: Well, I can tell you, Judge —

THE COURT: — the testimony involves somebody out there, or she wouldn't be here, but —

MR. LaRENE: I can tell you it — her testimony touches almost exclusively on Ken Christunas. However, it may also touch on Herbert Micou. The problem with

that, I suppose, with Mr. — is that Mr. Mateo at one point, I believe, represented Gary Sancho in criminal — state criminal proceedings; (254) did not represent the witness.

Well, it's a small town, Judge.

THE COURT: Getting smaller all the time.

MR. LARENE: We have fifteen people, and they keep bumping into each other.

* * *

(262) * * * THE COURT: All right. well, then we've only got the one situation, and that's Mr. Kenneth Christunas and his relationship with Mr. LaRene, and I presume that we'll — you'll have those contacts —

MR. LARENE: Yes, your Honor.

THE COURT: — Mr. Christunas, you'll have the contacts with Mr. LaRene —

DEFENDANT K. CHRISTUNAS: Yes.

THE COURT: — a chance to discuss this in depth and at length with him between now and next Thursday morning, March the 18th, and you'll also have that opportunity to do what I've suggested and encouraged you to do, and that is to get some indepenednt counsel to also review the matter for you.

DEFENDANT K. CHRISTUNAS: Yes.

(263) THE COURT: Okay?

All right. With that, then, is there anything else to go on the record before we adjourn for the day?

MR. LARENE: No, sir.

* * *

DISCUSSION REGARDING SUSAN SANCHO

[TRANSCRIPT VOLUME III, PROCEEDINGS OF MARCH 18, 1993]

(5) * * * THE COURT: All right. When we — we're, of course, in the absence of the jury.

You can be seated.

When we adjourned on Tuesday, March 16th, we had taken some testimony outside the presence of the jury from Susan Sancho, the widow of Gary Sancho, and a lady who had previously been represented in a forfeiture proceeding brought against — originally against her and her late husband by the government in which they sought forfeiture of the marital home on the basis that it had been used in certain drug trafficking activities, and of course the — the problem arose that Mrs. Sancho had been represented in those forfeiture proceedings by Mr. LaRene who is representing Mr. Ken Christunas in these proceedings, and there was the — the definite (6) possibility that during cross-examination of Mrs. Sancho, who is a government witness in this matter, that — that defense counsel would want to go into the matter of the — of the forfeiture case in which apparently it was the position asserted by her through her legal counsel Mr. LaRene that she had no knowledge of or participation in any drug-trafficking activities which, if that were her position at that time, would be apparently contrary to certain testimony which the government expects her to offer here in that I assume she's called here on the basis that she's aware of her husband's involvement in drug trafficking and in his relationship with, I assume, certain of these defendants.

At the time we adjourned, I had advised Mr. Ken Christunas of his constitutional right to conflict-free representation. I also instructed him as to the problems which were inherent in being represented by an attorney with a conflict of interest or divided loyalties, and I don't — as I have said before, I don't say that critically of — of Mr. LaRene. It sounds like a perjorative statement, but it's not intended to be that. It's just as a matter of fact the way the situation arose, and I also inquired of Mr. Christunas whether he wanted the opportunity to confer in depth and at length with Mr. LaRene concerning this situation, and I encouraged him to do so, and I also encouraged him to seek advice from independent counsel and granted him a reasonable (7)

time to make his decision as to what he wanted to do under these circumstances in which it appears that Mr. LaRene is — does have this situation where he both represents Mr. Christunas in the — in these criminal proceedings and also represented Mrs. Sancho, a government witness in this case, in defending a forfeiture action brought against her and her late husband.

Now, Mr. Christunas, you have, I take it from representations made to me in chambers earlier this morning, had some discussions — some additional discussions with Mr. LaRene concerning this entire situation?

DEFENDANT K. CHRISTUNAS: Yes, I did, your Honor.

THE COURT: And were those discussions conducted, as I've indicated, at length and in depth concerning this entire problem that has arisen here?

DEFENDANT K. CHRISTUNAS: Yes, they were, your Honor.

THE COURT: All right. And I understand — perhaps Mr. LaRene would want to indicate to me his interpretation of those discussions. Then I can ask you whether that's your understanding as well.

MR. LARENE: Mr. Christunas and I have come to the conclusion that it is — would be appropriate — well, that the cross-examination should be conducted — the cross-examination of Mrs. Sancho that might — that would touch upon (8) her position taken in the — in the resolution of the forfeiture case should be conducted — should be a part of the cross-examination.

Mr. Christunas wishes me to continue as his attorney and does not wish to waive his right to conflict-free representation in order to have me continue as his attorney and does not wish to have me avoid the area of cross-examination that we discussed.

However, he has also consulted with Mr. Robert Morgan who is in court today, who is a lawyer, a member of the bar of this court, and consulted with him at some length, and we propose — and it is acceptable to Mr. Christunas as a way to resolve, in our view, the — the issue and the conflict now before the Court

— that Mr. Morgan will — or would be permitted to conduct the cross-exam — the entire cross-examination of Mrs. Sancho, including such cross-examination of Mrs. Sancho regarding the forfeiture case.

Is that correct?

DEFENDANT K. CHRISTUNAS: Yes, that is correct.

MR. LaRENE: And I have also explained to Mr. Christunas that it is conceivable that I could offer some testimony as to non-privileged communications, non-privileged because perhaps they were in the presence of third parties which [*sic*] whom I did not have an attorney-client relationship or the like, regarding Mrs. Sancho's role or statements made in (9) connection with the civil — civil case but that obviously if I cannot — if I am to continue to be his lawyer, I could not also appear as a witness.

Mr. Christunas was aware of this fact before trial — this potential before trial — several weeks before trial, and then and now he is willing to waive any right he may have to call me — he might have otherwise had to call me as a witness so that he can instead have me as his lawyer.

Is that correct, Mr. Christunas?

DEFENDANT K. CHRISTUNAS: Yes, your Honor, that is correct.

THE COURT: Do you understand, Mr. Christunas, that while Mr. LaRene is barred by the Rules of Evidence and various ethical considerations from disclosing any confidential communications he may have had with Mrs. Sancho within the attorney-client relationship, there may be other matters that became known to him through his representation of her — that is, conferences that may have been attended by other parties, for instance — that would not be covered by the attorney-client privilege. Do you understand that? In other words —

DEFENDANT K. CHRISTUNAS: Yes, I do, your Honor.

THE COURT: — he — on those matters, he would be a qualified witness.

DEFENDANT K. CHRISTUNAS: Yes, I do, your Honor.

THE COURT: And is it your understanding — is it — (10) it's your understanding, I take it, that — that he is not going to be a witness in this matter. Is that correct?

DEFENDANT K. CHRISTUNAS: Yes, that is my understanding, your Honor.

THE COURT: Even though he might be able to offer, notwithstanding the attorney-client privilege, some testimony that would tend to impeach or discredit Mrs. Sancho's testimony for the government in this case.

DEFENDANT K. CHRISTUNAS: Yes, your Honor. We discussed it in detail.

THE COURT: And are you willing to proceed under those circumstances with Mr. LaRene continuing as your legal counsel in this case and with Mr. Morgan coming into the case only for the purpose of cross-examining Mrs. Sancho?

DEFENDANT K. CHRISTUNAS: Yes, I am, your Honor.

THE COURT: All right. Mr. LaRene?

MR. LARENE: I was going to add that I have discussed the case with Mr. Morgan and in fact have turned over a file of materials regarding the cross-examination of Mrs. Sancho to Mr. Morgan. I have not, however, and will not have any discussions with Mr. Morgan regarding any confidential or other communications that I have had with Mrs. Sancho whatsoever. I have only disclosed to him the fact of my representation, and I have discussed with him and would continue to discuss with him non-privileged matters regarding (11) conversations with others — for example, the United States attorney who was handling the forfeiture case — and I have not included in my file of any documents which are even remotely within the scope of the privilege, and I will not share with him any documents which I acquired in the scope of the privilege.

THE COURT: You're representing that you will not — you have not and will not disclose to Mr. Morgan not only privileged matter between yourself and Mrs. Sancho which, of course, I would in any event —

MR. LARENE: Right.

THE COURT: — know that you would not disclose as an officer of this court and a member of the bar of this court, but you also are not going to reveal non-privileged matter that transpired between yourself and Mrs. Sancho?

MR. LaRENE: I — that is correct. I — I think that it is —

THE COURT: So Mr. Morgan won't have that at his —

MR. LaRENE: Well, yes.

THE COURT: — for his purview and in preparation for his cross-examination of Mrs. Sancho.

MR. LaRENE: He — he will not. My judgment is that that will not impair his ability to prepare to cross-examine the witness, and since I cannot in good conscience be certain what conversations I may have had with her in the presence, (12) for example, of third parties and not in the presence of third parties, I just thought that it was best to err on the side of caution. If I thought that there were any such conversations which I could disclose to him and he could use, I — I would have, but I — I just don't think that that is — that there is any such material that I could comfortably do, and I just think in light of everything, that it's best that I err on the side of caution.

THE COURT: Mr. Christunas, you've heard those comments of Mr. LaRene, have you not?

DEFENDANT K. CHRISTUNAS: Yes, I have, your Honor.

THE COURT: And is that satisfactory to you?

DEFENDANT K. CHRISTUNAS: Yes.

THE COURT: Do you understand that he's not going to — Mr. LaRene, your attorney in this matter, is not going to reveal or release to Mr. Morgan matters that transpired between himself and Mrs. Sancho. Not only is he not going to reveal any matters that are privileged — that is, any confidential communications between the two of them — but he's also not going to reveal any — any — communications, contacts between them, information that passed between them that are not privileged because, for instance, they occurred in the

presence of other parties. Do you understand he's not going to give that — any of that to Mr. Morgan to assist him in preparing for cross-examination of Mrs. Sancho?

(13) DEFENDANT K. CHRISTUNAS: Yes, I do, your Honor.

MR. LaRENE: I should add, I also think that if we — if I follow that procedure, all — the Court and all parties can be assured that any cross-examination of — that Mr. Morgan may attempt regarding the dealings that Ms. Sancho may have had with her lawyer unnamed will not be based on any questionable information.

THE COURT: Do you understand that you would have a constitutional right to have that information, the non-privileged information, in the hands of your attorney Mr. Morgan so that he could utilize it in his cross-examination of Mrs. Sancho?

DEFENDANT K. CHRISTUNAS: Yes, I do, your Honor.

THE COURT: And nevertheless, you're willing to — to waive that right?

DEFENDANT K. CHRISTUNAS: Yes, I am, your Honor.

THE COURT: All right. Mr. Morgan?

MR. MORGAN: Yes, sir.

THE COURT: Would you just please place on the record your understanding and your position of your role in this matter?

MR. MORGAN: Good morning, your Honor. Robert Morgan.

My understanding is, as represented both by Mr. LaRene and Mr. Christunas, and I have discussed this matter, (14) I believe, at length substantially and completely with Mr. Christunas, and I'm — and I'm confident that he understands all of the various ramifications.

THE COURT: All right. And so you do expect — if Mrs. Sancho is called to the stand to testify as a government [*sic*] in this matter, you expect to conduct the cross-examination of — of her on behalf of Mr. Ken Chruistunas.

MR. MORGAN: Yes, I do, your Honor.

THE COURT: All right. And you — and you've been apprised, certainly, of the limitations that you'll have to

deal with in that cross-examination in that you will not have the benefit of even the non-privileged information from Mr. LaRene who is the — the attorney of record for Mr. Christunas in this trial.

MR. MORGAN: Yes, sir, I understand.

THE COURT: All right. Okay.

Mr. Cares, does the government want to make a statement regarding the status of this entire matter?

MR. CARES: I just want to place something on the record.

THE COURT: Yes.

MR. CARES: Just so the record is clear — and I believe Mr. LaRene will acknowledge — is this issue did not just arise now. On February 1st, I discussed with Mr. LaRene that Susan Sancho would be a witness, and he immediately told (15) me about the potential conflict, that he could be a potential witness, and I'm sure that he has talked with his client about that in advance of trial, and I — I would just want that to be acknowledged.

MR. LaRENE: That — that is correct. Mr. Cares and I did discuss it at that time, and I did in fact, as I believe Mr. Christunas has already acknowledged, discuss it at that time.

THE COURT: Is that correct, Mr. Christunas?

DEFENDANT K. CHRISTUNAS: Yes, your Honor, it is.

THE COURT: All right. Well, Mr. Morgan, as I understand it, you — you feel you're not prepared at this time to proceed to cross-examine Mrs. Sancho if and when she appears as a government witness. Is that correct?

MR. MORGAN: That's correct, your Honor.

THE COURT: And I take it you want the opportunity to review her grand jury testimony which consists of some forty pages, as it was indicated to me?

MR. MORGAN: Well, I would like to review her grand jury testimony. I'd like to, after reviewing her testimony, consult with Mr. Christunas for as long as appropriate. In (16) that regard, I'd like to review the civil forfeiture file, and obviously I'd like to get some sense of the testi-

mony that precedes or has preceded Ms. Sancho, so as well as —

THE COURT: Testimony — testimony that —

MR. MORGAN: The earlier testimony in the trial.

THE COURT: All the earlier testimony?

MR. MORGAN: Well, I'm not going to request a transcript. I'd just like to, I — I guess, become acquainted with —

THE COURT: All right.

MR. MORGAN: — what has transpired thus far as it may impact on cross-examination —

THE COURT: All right.

MR. MORGAN: — and I don't think I could do that certainly today or — or tomorrow.

THE COURT: Ms. Sancho herself testified briefly out of the presence of the jury on Tuesday, and I would suggest that you'd probably want to — that was very brief testimony. You might be able to satisfy yourself by merely listening to the tape of that — of that testimony.

MR. MORGAN: We've already ordered the transcript —

THE COURT: Okay.

MR. MORGAN: — and I understand that it will be available shortly.

THE COURT: All right.

(17) Well, in light of the — of this situation which the Court finds to be a diffucult one, I'm going to, first of all, request that — and I understand there's no difficulty with this — request that Mrs. Sancho's testimony if she is called to the witness stand in this matter be deferred to a later date. As you know, we're in — we're to continue with the jury today, March 18th, and tomorrow, March 19th, but then next week, the entire week I'll be trying a case in Chicago, and we won't be resuming until a week from next Monday, which would give them — give you, Mr. Morgan, about ten or eleven days to prepare. She wouldn't be on the stand, then, earlier than — what would be the date? it would be the 1st of April, I guess, wouldn't it?

MR. MORGAN: 29th, I believe.

THE COURT: No. 29th is — the 29th is — well, wait a minute. Let me see.

MR. LaRENE: March 29th, I believe is the —

THE COURT: Yes, that's correct. Yes. We'll be back in session. I'll be gone for the week of Monday, March 22nd, through Friday, March 26th, in Chicago, and then the trial will resume on Monday, March 29th, so she won't be called to the stand before March 29th under those — under these circumstances.

Is that satisfactory to the government?

MR. CARES: Yes, sir.

(18) THE COURT: All right. Okay.

Will that — does that give you adequate time, then, to prepare for cross-examination?

MR. MORGAN: Yes, sir, it does.

THE COURT: All right. Okay.

Now, I'm going to take this entire matter under advisement. I — I want the opportunity to conduct some additional research. It's a delicate situation, as I think everybody recognizes, and I — I'm not certain at this point that — that I'm going to accept and approve this proposed procedure. I may come to the conclusion that it's necessary to take other action under the — under the circumstances, and therefore I'll take this under advisement until March the 29th. All right?

MR. MORGAN: Yes, sir.

* * *

DISCUSSION REGARDING SUSAN SANCHO

[TRANSCRIPT VOLUME V, PROCEEDINGS OF MARCH 29, 1993]

(5) * * * THE COURT: We've had the preliminary matter involving the — the situation concerning the proposed testimony of — of Mrs. Sancho. Just to again place on the record the situation that exists in that regard, she has been subpoenaed to appear here as a government witness, and it's my understanding that her

testimony would implicate a defendant or defendants in this case and would regard her late husband Gary Sancho's participation in a marijuana trafficking operation with Mr. — at least Mr. Kenneth Christunas, one of the defendants in this case.

We have a situation in which she and her late husband were defendants in a forfeiture action brought by the government which concerned their marital home. It may have concerned other assets, but at least it concerned their marital (6) home, with the government having asserted the position in that litigation that the home was either used in the course of narcotics trafficking or was acquired with the proceeds of narcotics trafficking, and I'm not sure which, but in any event, it was the government's position that it was subject to forfeiture. In those proceedings and apparently while those proceedings were pending, Mr. Sancho died, and then later there was a settlement reached between the government and Mrs. Sancho in which she received some thirty to $35,000 in a cash settlement from the government for her equity in the — in the home, and I — and it's the Court's understanding and I think it's well known to all the attorneys and to the defendants, including Mr. Kenneth Christunas, that in those proceedings, Gary Sancho and his wife — what's her first name? I can't recall it offhand.

MR. CARES: Susan.

THE COURT: — Susan Sancho were represented by Mr. Deday LaRene who, of course, is the attorney of record for Defendant Keith Christunas in these proceedings. That situation raised the possibility of a conflict of interest on the part of Mr. LaRene in that he of course owes a duty of loyalty to Mr. Kenneth Christunas — his attorney in this proceedings and also, of course, acted as attorney/counselor in a confidential relationship with Mrs. Sancho with regard to the forfeiture action in which she was his client and in which he (7) did participate in the negotiation of the settlement which resulted in her receiving this sum of thirty to $35,000 cash.

The Court — it has been indicated to the Court that, as I've said previously, that her testimony may well implicate Mr. Christunas and her late husband in a marijuana trafficking operation. This would be a — this — such testimony then may very well be in conflict with the position asserted by her or her attorney — and/or her attorney Mr. LaRene in the forfeiture proceedings in which it was, so I am informed, her position that she had no knowledge of any activity of her husband Gary Sancho in — with regard to marijuana trafficking, that she in effect was an innocent party insofar as her interest in the marital home was concerned, and therefore that the government should not have the right to take that home from her in the forfeiture proceedings.

Mr. LaRene is in the situation under those circumstances certainly of being unable to — to testify to those matters which were — involved a confidential relationship between himself and Mrs. Sancho and certainly could not reveal any confidential communications in the past between the two of them during those proceedings. Mrs. Sancho has appeared on the witness stand here out of the presence of the jury and has indicated that she was not willing to waive her privileged [*sic*] under the attorney-client relationship: that is, her right to (8) confidentiality of the relationship between herself and Mr. LaRene.

The — while there are other matters in which conceivably Mr. LaRene could be a witness and that — those matters would relate to communications made or statements made by Mrs. Sancho which were not confidential — that is, were made in the presence of other parties — Mr. LaRene has assured the Court that he does not intend to be a witness in these proceedings, so we have a situation in which he will not be testifying, as I understand it, even as to those matters that may not be privileged between himself and Mrs. Sancho.

I have inquired of Mr. Christunas on the record on a prior occasion in this matter, and at that time I advised him of his right to conflict-free representation in this

matter. I also instructed him as to the problems that were inherent in his being represented by an attorney with divided loyalties. I inquired as to whether he had had the opportunity to discuss the matter at length and in depth with Mr. LaRene. He indicated at that time that he had not had that opportunity at that point, and I also encouraged him to seek advice from independent counsel, and he indicated that he wished to take advantage of that opportunity to seek advice from independent counsel, and also I allowed him a reasonable time to make his decision regarding the matter, and he's, of course, had that opportunity at this point.

(9) Now, I'm informed that there has been some additional discussion concerning this matter and that Mr. LaRene, with regard to the cross-examination of Mrs. Sancho, will not be conducting that cross-examination: rather, that Mr. Christunas will be represented for that purpose and for that portion of the trial only by attorney Robert Morgan. Is that correct, Mr. LaRene?

MR. LARENE: Yes, your Honor.

THE COURT: All right. Now — and do I correctly state that while, of course, it's clear that you could not testify as to any confidential communications or confidential matters between yourself and Mrs. Sancho, it is also your intention not to be a witness in any event, even as to matters which are not confidential between yourself and — and Mrs. Sancho?

MR. LARENE: Yes, your Honor.

THE COURT: All right. Now, Mr. Morgan, then, will be cross-examining Mrs. Sancho, and what is your understanding as to the extent of his cross-examination?

MR. LARENE: Other than the matters which would not be affected by the forfeiture action, he will, as I understand it, cross-examine Mrs. Sancho about the circumstances of the forfeiture based on public records, like the forfeiture or the answer filed by her, stipulation for the result — for — for settlement. He will cross-examine her about the — the documents (10) filed over my signature on her behalf in which she asserted that she was

an innocent spouse. He will cross-examine her about the — the settlement which was reached after her husband's death, although not referring necessarily to her husband's death.

He has — I have not told him anything about my conversations with Mrs. Sancho or Mr. Sancho, and he may inquire — I — I can't tell you exactly what questions that he would ask, but I would assume that he will inquire — I believe that he will inquire about these documents in which she takes a certain position or a position was taken for her. If she professes not to know the contents of the documents, I presume that he would cross-examine her, as any lawyer would any person in that position, about whether she had ever discussed the matters contained in the documents with her lawyer. He will not introduce the documents as evidence. He will not bring out before the jury who her lawyer was.

If the witness denies having discussed the matters of position taken on her behalf in the action or in settlement of the action or her receipt or the basis upon which she receives the $30,000, I guess Mr. Morgan can — can go no farther. The jury, of course, is free to believe or disbelieve her denials, if denials they be.

THE COURT: In other words, it's your understanding that he would seek to introduce the — the agreements?

(11) MR. LaRENE: No, no. I don't —

THE COURT: No?

MR. LaRENE: No. He — he will not seek to introduce the documents themselves, just cross-examine her about their existence. The reason that he won't introduce the documents is because they bear my signature, and we think that it is inappropriate to put before the jury the fact that I represented her and thereby put into issue my credibility or my conduct as her lawyer.

Basically, I — just as I've attempted to cross-examine, for example, Mr. Michelson about documents that were filed in his case, Mr. — Mr. Morgan will ask the same kinds of questions that any lawyer would ask any wit-

ness about any document that was filed in a lawsuit in which that person was a party on their behalf, and that may involve questions in which the word "lawyer" or where — which refer to discussions with lawyers, but he will ask those questions without benefit of any knowledge regarding those conversations and will not attempt to get into the substance of those conversations any more than any lawyer could get into any — the substance of any privileged conversations.

THE COURT: All right. All right.

Mr. Cares, is that your understanding of the situation in which we find outselves today?

MR. CARES: It is.

(12) THE COURT: Let me inquire of you, Mr. Cares, this: is it your understanding that the testimony of Mrs. Sancho will involve other defendants than Mr. Kenneth Christunas or only Mr. Kenneth Christunas?

MR. CARES: Just Kenneth Christunas.

THE COURT: All right. Okay.

Mr. Christunas — Mr. Kenneth Christunas, I'm going to address you now. You've heard all these matters discussed here this morning. Is — is your understanding of what's to occur now and what — what's been arranged and what's going to transpire the same as what has been indicated here in court by myself and by Mr. LaRene, your attorney?

DEFENDANT K. CHRISTUNAS: Yes, it is.

THE COURT: All right. Now, I'm going to tell you again because I want to be very clear that you're aware of your entire situation.

In a — in a criminal trial, defense counsel's most important function, really, is to vigorously cross-examine the government's witnesses. However, when one of the government's witnesses is a former client of defense counsel, then defense counsel's ethical obligations may conflict. On one hand, of course, defense counsel is under a duty to represent zealously yourself; on the other hand, defense counsel has a duty of confidentiality to his former client, the government witness,

and to limit cross-examination of the former client matters in (13) the public record may prejudice the defendant if more searching inquiries are necessary for a complete evaluation of the testimony against the defendant.

Here in this situation, we have one in which Mr. LaRene in any event could not testify as to the — as to the confidential communications between himself and Mrs. Sancho because those are absolutely privileged, but also there will be no testimony adduced from him regarding any communications or statements made by Mrs. Sancho which are not privileged: that is, that may have been made in the presence of — of third parties. Do you understand that, sir?

DEFENDANT K. CHRISTUNAS: Yes.

THE COURT: All right. The — so we have a situation where, as I have indicated, that the limiting of cross-examination in this matter may prejudice you to some extent if a more searching inquiry was necessary.

Alternatively, of course, if the cross-examination was not limited, then there might be an intrusion into the former client's attorney-client privilege, although that would not necessarily occur under the circumstances that I've outlined here today.

Now, you have had, as I understand it, the full opportunity now to — to explore this matter at length and in depth with Mr. LaRene, your chosen attorney. Is that correct?

DEFENDANT K. CHRISTUNAS: Yes, that's correct.

(14) THE COURT: All right. And you've also had the opportunity and you've taken the opportunity to seek advice from independent counsel. Is that correct?

DEFENDANT K. CHRISTUNAS: Yes, sir.

THE COURT: And is that independent counsel attorney Robert Morgan?

DEFENDANT K. CHRISTUNAS: Yes, it is.

THE COURT: All right. And have you had — I know some days have passed how — have you had, in your opinion, a reasonable time for you to make your decision

as to how you want to proceed under this entire situation?

DEFENDANT K. CHRISTUNAS: Yes, I have.

THE COURT: All right. And you've — you've heard Mr. LaRene express the — the position that will be adopted here in this matter by himself and by Mr. Morgan: that is, that he, Mr. LaRene, will not be a witness under any circumstances even as to those matters that are not confidential between himself and Mr. Sancho, and Mr. Morgan will be somewhat limited in his cross-examination of Mrs. Sancho. In other words, if — if she denies knowledge or denies making any prior inconsistent statement, that he won't be in a position of producing testimony from Mr. LaRene as to those possible prior inconsistent statements which she may have made regarding her knowledge or lack of knowledge of any marijuana trafficking.

(15) DEFENDANT K. CHRISTUNAS: Yes, I do.

THE COURT: All right. Knowing all these things and having been advised of all these things, are you agreeable to this procedure?

DEFENDANT K. CHRISTUNAS: Yes, I am.

THE COURT: All right. And you understand that you then are, under these circumstances, waiving the — the constitutional right — to a certain extent, you're waiving your constitutional right to representation by counsel who has no divided loyalties whatsoever. Do you understand that, sir?

DEFENDANT K. CHRISTUNAS: Yes.

THE COURT: All right. But it is satisfactory with you if Mr. Morgan does take over and does conduct the cross-examination of Mrs. Sancho subject to the strictures and the limitations that have been outlined here in the courtroom this morning.

DEFENDANT K. CHRISTUNAS: Yes.

THE COURT: All right. Very well. Just a moment.

I should — there's two other matters I should mention. It's my understanding that Mr. Morgan has — is — has — is acting as an attorney in other matters for Mr. LaRene, and, Mr. Christunas, are you aware of that?

DEFENDANT K. CHRISTUNAS: Yes, sir, I am.

THE COURT: You're fully aware of that, and that (16) doesn't change your —

DEFENDANT K. CHRISTUNAS: No.

THE COURT: — decision in any way?

DEFENDANT K. CHRISTUNAS: No.

THE COURT: Very well. Mr. Cares, do you intend to instruct Mrs. Sancho that she shall not mention Mr. Deday LaRene's name during her testimony?

MR. CARES: I've already told her that on a number of occasions, but just before she testifies, I will remind her of that again.

THE COURT: All right. All right.

Does the government have any comment or any — or wish the Court to make any further inquiry at this point?

MR. CARES: Not on this issue.

THE COURT: All right. Okay.

* * *

DEFENSE OF WITHDRAWAL

[TRANSCRIPT VOLUME VIII, PROCEEDINGS OF APRIL 5, 1993]

(145) * * * MR. LARENE: . . . There is this matter however, the Court ruled at the beginning of trial that what — the Court was told at the beginning of the trial that the Defendants James Christunas and Arthur Brayman intended to present a defense of withdrawal and this — and they asked the Court to allow them the bifurcated trial procedure that the Court allowed.

THE COURT: Yes. Yes.

MR. LARENE: I am advised by counsel for those two Defendants, however, that they no longer wish to present the withdrawal defense and are — are going to withdraw their request for a bifurcated trial.

THE COURT: Can I hear from counsel for those parties on that matter?

MR. HOWARTH: On behalf of James Christunas, your Honor, Mr. LaRene is correct that we are not asking for bifurcation nor will we present a withdrawal defense.

MR. SASSE: That is also correct with respect to Arthur Brayman, your Honor.

THE COURT: All right.

MR. LARENE: However —

THE COURT: Well, it was an interesting academic exercise.

(146) MR. SASSE: Well, now you —

MR. LARENE: Well, Judge, it's not academic.

THE COURT: All right.

MR. LARENE: Because the same — the reason that those Defendants no longer — now wish to rely on reasonable doubt and eschew the withdrawal defense has moved me on behalf of Mr. Christunas to make this request to the Court: I now wish to present the defense of withdrawal. And I would ask the Court to allow me the — the bifurcation that it's previously ruled to be proper. I can be — I will and I think I ought to be much more specific.

THE COURT: I think you'd need to be.

MR. LARENE: I guess —

THE COURT: I don't have much time now —

MR. LARENE: I understand. I — I don't expect you to rule today —

THE COURT: — by the way.

MR. LARENE: — but I just wanted you to know that it was — this is — that this is what was coming.

They — as I told you originally, Mr. Ken Christunas had testimony that he could offer and would — and might well be prepared to offer regarding the early years of the conspiracy and the Defendants' withdrawal therefrom. Mr. Christunas is prepared to testify and wishes to testify that — that he was indeed involved with marijuana trafficking (147) activities in the early 80's. But that after his arrest in Florida on — in December of 1985, he became terrified and decided to change his life around. That's why for example, he filed — that he filed this 1985 return

claiming all the money he had made and trying to clean up his — his act, and clean up his life. And he has embarked on this — on a — his — his true legal trade of construction, et cetera. That — that — the business, the conspiracy if you would, that perhaps he started or was involved in the starting of may have continued, but it did so specifically without him, and it did so specifically by other members of his family, and did so specifically without his participation, and with his having communicated to his former co-conspirators that he no longer wished to be involved. And that that, his withdrawal from the conspiracy occurred substantially before — it would be April of 1987 which would have be[*en*] the five year statute of limitations period that — that would — would control in the case of this indictment which was returned in April of 1992. He will not, however, pursue that defense at a joint trial, because to do so would be obviously and clearly detrimental to persons — members of his family who — as to whom there is evidence of part — direct evidence of participation as late as — well, in later years.

He believes but I don't — this is — I can't — again I can't make a contract with this testimony, but he (148) believes that there would be testimony available for certain of his — from certain of his brothers, including his brother Joe and his brother Tom, who would support this with this defense and — but would do so at — at the expense of implicating themselves and perhaps other Defendants who are — who are here on trial. I have spoken to Ms. Silver who represents his brother David and again without signing an irrevocable contract, she is — she has led me to believe that there might be test — there may well be testimony available from David Christunas who pled guilty, as the Court knows, to activities in 1990. That his brother Ken had withdrawn from any such activities well before that date.

That's the specific proffer, that's my specific argument. I understand this — well, that's what I'm going to ask you for when I have the time to ask you properly.

THE COURT: Okay. Well, we'll take the matter up at the appropriate time. I would assume that counsel for the — for the other Defendants who — whom it has been indicated to me may — that those other Defendants may wish to testify on behalf of Mr. Kenneth Christunas defense of withdrawal are aware of the possible implications of their testimony in that regard, despite the fact that there may have been verdicts rendered or returned in their cases. I — as I observed previously when the shoe was on the other foot, the — the fact that for instance a defendant who now testifies or (149) chooses to testify in that regard, after having been convicted, if that's what happened, gives testimony that certainly could very well be used against that defendant in a subsequent proceeding in case there were [*sic*] a new trial granted for instance, a reversal of the conviction. So I'm sure counsel will fully advise their client as to —

MR. LaRENE: Yes.

THE COURT: — as to the jeopardy that's created by that —

MR. LaRENE: Judge, the — the —

THE COURT: — by that situation.

MR. LaRENE: With or without the availability of testimony from co-Defendants however, I — Mr. — Ken — it's Ken[*'s*] position that he would not advance this defense of withdrawal at a joint trial because it would be —

THE COURT: Oh, I understand — I understand that's his position now. It was the position of the other Defendants —

MR. LaRENE: Yes, sir.

THE COURT: — who asked for the bifurcated trial previously.

MR. LaRENE: Yes, sir.

THE COURT: Any brief comment you want to make?

MR. CARES: Your Honor —

THE COURT: I'm way beyond where I expected to be (150) meeting with another judge here —

MR. LaRENE: Yes, I'm sorry.

THE COURT: — in preparation for the bench meeting. But —

MR. CARES: I just — I just very strenuously object for a lot of reasons for which I will not state now because of the Court's scheduling concerns. One is, what appears to be a manipulation by the defense team on this case, and I want to get into that in some detail.

THE COURT: All right.

MR. HOWARD: Your Honor, just for the record, my client, Robert Johnson, has indicated to me that he desires to with — to evoke the withdrawal defense also. And I would adopt to the extent applicable in connection with proofs in that regard, the arguments at least advanced up to this point by Mr. LaRene.

THE COURT: Well, it does strike me as a bit peculiar that — frankly that this — that these issues are raised at this point of the proceedings. I exhaustively went into this entire matter before we started the trial. And we did a lot of research on the matter and — and reached what I considered to be a very deliberate and considered judgment or decision regarding the matter. And now I'm confronted with an entirely —

MR. LaRENE: Yes, I — I —

(151) THE COURT: — different situation. As I say, it does strike me as somewhat, shall I say, to put it charitably, intriguing that — that this now is happening at this trial.

MR. LaRENE: I — I will be happy to explain my actions and my — and defend them at the appropriate time —

THE COURT: All right.

MR. LaRENE: — I think it would be premature now.

THE COURT: All right.

MR. LaRENE: But I — it's all — it all makes perfectly good sense.

THE COURT: All right. We'll — we'll adjourn until 8:30 tomorrow morning.

* * *

MOTION FOR BIFURCATED TRIAL AND COURT RULING
[TRANSCRIPT VOLUME IX, PROCEEDINGS OF APRIL 6, 1993]

(5) * * * THE COURT: I believe we have the matter of the request by certain additional Defendants for a bifurcation of the trial before the Court this morning. At the time we adjourned yesterday, the Defendants James Christunas and — and Arthur Brayman, who had been granted a birfurcated trial in order to expedite and implement their intention to present the affirmative defense of withdrawal from the conspiracy at a time which would implement the provisions of the statute of limitations, had withdrawn their request for a bifurcated trial.

But then it was indicated to the Court, of course, that Defendants Kenneth Christunas and David — no, and Mr. Johnson, I believe, correct? And — and Defendants Kenneth Christunas and Robert Johnson desired to assert such a defense (6) of withdrawal from the alleged conspiracy, at a time more than five years prior to the date of the indictment. And the Government has indicated that there would be an objection to the granting of a bifurcated trial for these two Defendants.

So we'll hear from counsel on that matter at this point, if you're prepared to argue it.

MR. LARENE: I am. I said a bit of what I wanted to say yesterday. I will just expand on it and explain, perhaps, how this came to pass, this odd turn of — what may seem like an odd turn of events.

It — it — it — this — the defense of withdrawal is not one which I personally have a great deal of taste for. I've tried it before. The downside, of course, is that the defendant has to admit that he was involved in the criminal activities, and it has the sort of air of a loophold or technicality. It's hard to get a jury to, I think, to — to listen carefully and with a sympathetic ear, if you will, to a person that says that he committed a crime, but he shouldn't now be testified [*sic*] because the Government didn't catch him soon enough.

And for that reason, prior to trial, I advised Mr. Christunas, and Mr. Christunas agreed with me, that we would not want — I would not want to present that defense that we would — especially after — especially after the Court granted the motion to suppress the evidence seized from the (7) trunk of his car in Florida. I just felt, well, with no — no drugs, no — and — and testimony of co-conspirator witnesses, I was more comfortable just arguing reasonable doubt, and the insufficiency of the Government's evidence.

The case went in stronger than I thought it would, frankly, and with all of the — the witness testimony against Mr. Christunas, as we came close to the end of the Government's case, I reevaluated our position.

I spoke to Mr. Christunas about his testimony, his potential testimony. That was done over this last weekend. His testimony would, as I've indicated to the Court previously, be exculpatory of himself, as respect[*s*] the — of the cessation of his involvement in the activities prior to the — the limitations period of five years. However, it would be inculpatory of certain other Defendants, including members of his family.

He — he's not comfortable and I am not comfortable in offering that testimony at a joint trial, and we elected — decided on Sunday that we would ask the Court, now that once we knew that the — that the Defendants Brayman and — and James Christunas would not be asking for separate trial, that we would ask the Court, in the exercise of the same sort of reason, discretion, which allowed bifurcated trial for those Defendants, to allow us the same — the same opportunity.

Understanding that the request comes late, (8) understanding everything, understanding that it would probably be misconstrued by some people in this courtroom as an attempt to mislead or manipulate or play fast and loose, it's my job. So not to play fast and loose, but to make the request that I think will allow me to argue my client's case in the very best way that I can.

And my impression and my advice, now, is that — is that this is the Defendant Christunas' best hope for acquittal. I think that Mr. Christunas's testimony would be extremely helpful to himself. I think that in allowing him — in — in presenting this defense, it would allow us to explain truthfully much of the very damning evidence that has come in in the last few days, including, for example, his tax return, which is, I think, a very important piece of evidence in this case.

And if I advised him wrongly in the first instance, I suppose that's possible. It seems to me maybe I did, and I should have anticipated what this case was going to be like, and I should have told him right from the beginning that this was the defense we should use. And I should have presented it to the jury. I should have done all that, but I didn't, and now at the eleventh hour, I must do the best I can and that's what I'm trying to do.

I have made attempts to contact other Defendants. I have been advised by hearsay that certain of the other (9) Defendants may be willing to offer testimony at a separate trial. I have — I made attempts last night to confirm this, and I can't honestly report to the Court that I have confirmed offers to testify from any other Defendant, either a pleading Defendant or a Defendant on trial.

The heart of the request and the heart of my — of my — of the reason for my request is rather that Mr. Christunas cannot fairly — well, will not, and I think, cannot fairly be asked to offer his own defense at the expense of his brothers. And that's why I'm making the request now. All of the reasons that were offered on behalf of the other Defendants at the beginning of the trial, I think obtain, in the case of Mr. Christunas, as I've told the Court, if the Court does not grant the request, we will not offer the defense. I will simply rest and argue reasonable doubt.

THE COURT: All right. Thank you.

Mr. Howard, your client, Defendant Robert Johnson, as I understand it, also is requesting a bifurcated trial at this point; is that correct?

MR. HOWARD: Yes, he is, your Honor.

THE COURT: All right. I'll hear from you then.

MR. HOWARD: Very briefly, I had discussed — first of all, your Honor, in terms of defending this case and based upon the evidence as I perceive it to exist, I was of the opinion early on that he — he should — he should develop a (10) withdrawal approach. Assuming because of the nature of the — the withdrawal, the defense, requiring affirmative action, that we would require testimony to be effective on the part of — or from other Defendants.

My client, at the outset, your Honor, really misunderstood what I had attempted to explain to him, and I had explained it to him on a number of occasions in connection of the impact of what "withdrawal" means. He thought, based upon my discussions and emphasizing what occurred in 1984 and 1985, that he was asking that the Court sentence him under old guidelines. He's thinking guidelines, and I'm explaining the withdrawal and the statute of limitations, and the nature of the conspiracy and the affirmative action required.

It's imperative, as the Court knows, that we'd be able to establish that he had taken affirmative action. Ultimately I succeeded in persuading my client, first of all, in making him understand what happened, what the consequences of the withdrawal is, and at this point, he desires the withdrawal. I've made, essentially, the same inquiry since Mr. LaRene has made, and — and I have precisely the same indications. And I recognize that it's addressed to the sound discretion of the Court. As I begin, and I had spoken several days ago to — to Mr. Cares about the withdrawal, and I just indicated to him, for no particular reason, that I would — I'm seriously considering this and I still have trouble (11) communicating with my client in the sense of him understanding it.

So I — I think, your Honor, that in as much as the Court has seen fit and to respond to the request of the other Defendants, that in permitting them to exercise the

defense of withdrawal, that — and coupled with the fact that one of the Mr. Christunas — Kenneth Christunas is requesting that he be permitted to — to exercise this defense, your Honor, that I — I would ask the Court to exercise that — permit us to do it also, essentially, on the basis that we are very hopeful that we will have testimony from other Defendants that will support our position.

THE COURT: You say you are hopeful of that.

MR. HOWARD: Well, your Honor, I — I — I thought about that word after, because that's a little out there in terms of expectation. No one has made any commitments in terms of testimony, your Honor. I have some indications, and I'm not going to commit anyone because it wouldn't be fair, but I have some — more than hope, your Honor, in terms of — of some of the other Defendants testifying with regard to my client's withdrawal.

THE COURT: Thank you. I'll hear the Government's response. Mr. Cares?

MR. CARES: I'm sure the Court is probably aware of the history of this issue, but just briefly let me state it (12) for the record.

Pretrial motions were filed by all the Defendants, and they divided, essentially, into two camps: those of the, quote, "withdrawing Defendants" and those of the other non-withdrawing Defendants. The withdrawing Defendants initially were: James Christunas, Arthur Brayman, and I believe Ernie Christunas, who was now no longer a Defendant. The remainder were the, quote, "non-withdrawing Defendants."

On September 16th, 1992, the Defendant Kenneth Christunas, filing through counsel, filed — filed a motion for severance, and that motion was based on this theory: the theory by Kenneth Christunas, presented at that time, was the other Defendants, meaning Brayman and so forth, are going to testify as to withdrawal, as therefore, "I am prejudiced because I'm not withdrawing." He, therefore, asked for a severance on that grounds.

And I would like to quote a portion from the brief filed in support of that motion by Kenneth Christunas. This is at page 2 of the brief in support of the motion by Kenneth Christunas, on behalf of all the other non-withdrawing Defendants. It reads, and I quote:

> "It should be obvious that not only will the three co-Defendants' defense [those are the non-withdrawals] be antagonistic as to the remaining Defendants, but also mutually exclusive. The withdrawal defense will put (13) forth the proposition that although the Defendants were once involved in the alleged conspiracy, their prosecution is barred by their withdrawal. Such a defense is completely at odds with that of the co-Defendants if they continue to assert their innocence and lack of involvement in any conspiracy whatsoever."

So the main premise of Kenneth Christunas and the non-withdrawing Defendants in that motion is that they were not withdrawing.

These Defendants have been given complete discovery. They knew — Mr. LaRene says, well, the evidence came in and it was stronger than he anticipated. Well, what — from a — from a qualitative standpoint, that may be true, but in terms of the nature and substance and essentially the evidence, that was — that had been made known to defense counsel well in advance of trial.

I would rely on the Causey case, Sixth Circuit case, which deals with actual severance, but I think the analysis applies to bifurcation. That's 834 F.2d 1277 —

THE COURT: (Interrupting) I — I must say that I — I — I do feel the rules are that — are the same, really. The same standards apply. And I don't know whether defense counsel agrees or disagrees with me on that, but it seems to me that the same standards applies. That is, bifurcation is just another way to get at the problem that's raised with a (14) request for a severance. That is, it's another way of approaching a situation without totally severing the — the matter.

MR. LaRENE: I think the same considerations apply, but the standards may be different because on the severance, when you're talking about a whole severance, and a whole duplication of trial effort, you have different considerations, different, not necessarily in kind, but in quantity, of considerations of judicial economy.

THE COURT: But — but you've got the same situation. In other words —

MR. LaRENE: No, I —

THE COURT: — if a severance were granted, it would be granted on the basis that, well, now — now these — these co-defendants, whose cases have already been tried, are in a situation where they may now be available to be witnesses for the defense in the — in the severed case of the — of the — of the defendants who admit they were involved in a criminal conspiracy, but claim they withdrew from that conspiracy.

MR. LaRENE: I — I understand. I agree — and I'm agreeing — I think I am agreeing — I think we're talking past each other. I agree with what the Court is saying, in terms of the considerations. I think thjey weigh differently, and I think that this bifurcation really is a remedy — should be considered a remedy short of severance.

(15) THE COURT: Uh-huh.

MR. LaRENE: But certainly, the same — the same considerations of, I think, they — as I say, they just may weigh differently because —

THE COURT: Yeah.

MR. LaRENE: — because the — the remedy is less drastic.

THE COURT: All right. Go ahead, Mr. Cares.

MR. CARES: If I may briefly state that test, because I'm going to apply it to — to what's been presented here this morning. There are four points to the Causey test: one, a bona fide need for the testimony; two, that substance of the testimony; three, its exculpatory nature and effect; and four, provide assurance that the co-defendant will, in fact, testify is the cases are severed.

What we've heard this morning is not specific substantive evidence that they, Defendants, could expect. It is, if anything, a mere hope. And I think that's the key word, and was used by Mr. Howard. Recall — the Court is aware that withdrawal is an affirmative defense, and it requires the Defendant to prove more than cessation and activity. The Court requires some renunciation of the conspiracy. I have heard nothing that any of the proffered testimony would be in the form of any kind of renunciation, anything other than cessation.

(16) We don't even have any kind of assurance — we're not — we don't even come close to any assurance that any of these co-Defendants would, indeed, testify.

I believe, and I think Mr. LaRene pointed out that the main concern, his main concern, and the concern of his client is, well, he doesn't want to testify at this phase because he would then inculpate his co-Defendants. Understanding that that's a rational sentiment, I'm not going to disagree with that type of attitude, but that's not the type of justification that would permit a severance. And I think the — that type of issue was addressed most recently in — by the United States Supreme Court in the *Zafiro* case. And if I may just quote from *Zafiro,* the court — the Supreme Court stated:

> "A defendant normally would not be entitled to exclude the testimony of a former co-defendant if the District Court did sever their trials."

And we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a co-defendant.

That concern, by Kenneth Christunas, that he may implicate his brothers, should not and does not, by *Zafiro,* justify a severance or a bifurcation.

I'd like to talk briefly about the prejudice to the Government, if the Court does grant bifurcation.

(17) THE COURT: Go ahead.

MR. CARES: The Court is well aware that both by the nature of the indictment and by the nature of the testi-

mony that the key Defendant in this case is Kenneth Christunas. There is no — there's no quibbling on that. Much of the testimony in this case, much of the evidence, especially towards the end, has been devoted to Kenneth Christunas, and a lot of that evidence has been devoted to and focused at the CCE charge, and he's the only Defendant charged with CCE.

If, in fact, there's a bifurcation at this — at this point, the practical realities are this: that the jury would deliberate on four, perhaps, five of the Defendants, not Kenneth Christunas. Then, after a verdict, presumably there would be a case on Kenneth Christunas.

The Court is aware — well, one of my concerns, and I believe everybody's concerns in this case, is the scheduling of this matter, because the — the further we get from testimony to deliberations, the more difficult it is for the jury to reach an informed, correct decision. To that end, the Government has done everything it could to expedite the — its case in chief, even in terms of eliminating some witnesses.

Now if, in fact, there is a bifurcation, the jury will deliberate, not on all the evidence as to Ken Christunas, but the evidence as to the others. Then there may very well be a long recess at which there would be a — the Defendant (18) Kenneth Christunas would be able to put on his case in chief, and the jury would deliberate. The evidence of Ken Christunas would be history, to some extent, in the past, in the jury's mind.

If the Government had suspected or known that there would be bifurcation, the Government would have proceeded differently. The Government — if at the commencement of the case, the Court had ordered bifurcation, the Government would have withheld much of the evidence against Kenneth Christunas. For example, the evidence as to wealth, and asked to present that at the second phase. The Government did not do that because the Government was under the belief — more than a belief, it was a — it was a order from the Court that there would be bifurcation, and the

only two Defendants who would be bifurcated were James Christunas and Arthur Brayman, not Kenneth Christunas.

So if, in fact, the Court grants bifurcation, the Government's case would be significantly prejudiced. I don't believe that the Defendants have met their burden, or have come close in meeting their burden under Causey, and the Government asks that the motions be denied.

THE COURT: Thank you. Response?

MR. LaRENE: May I respond, please?

THE COURT: Sure.

MR. LaRENE: First, as to the taking of inconsistent (19) positions, I — I've never said, on behalf of Mr. Christunas, and Mr. Christunas has never said that he was going to offer a case, an affirmative defense or testimony that he did not withdraw. As I — the motion — the part of the motion that Mr. Cares read, and our position with the Court and with Mr. Cares throughout, has not been that Mr. Christunas was going to make a testimonial claim that he was never involved, but that he was going to take the position by — by pleading guilty and relying on the presumption of innocence and the rules regarding the burden of proof that it would — that the Government could not prove his involvement.

Mr. Cares focuses on the unavailability of testimony — of the fact that we cannot demonstrate the testimony of co-Defendants will certainly be available at — at a separate phase of this trial. There is one very important bit of testimony that will be available at a separate trial, and that's Mr. Christunas's own testimony. And we assure the Court and Mr. Cares that that — that — that that testimony will be available. Indeed, that's the whole reason to allow the bifurcated trial procedure, so that to protect Mr. Christunas's constitutionally protected right to testify on his own behalf in substance, not just in form.

Mr. Cares talks about prejudice to the Defendant — to the Government. Quite frankly, I — I — what I hear — what I heard at first, I thought, was that the Govern-

ment (20) feels it would have a tactical advantage at a joint — joint jury deliberation, or joint trial. I don't know the tactical advantage is a grounds for consolidation of cases. I don't believe it is. If tactical advantage to the Defendant is not a grounds for severance, how can it be a ground to justify a joinder?

The jury will be told to consider the evidence against each Defendant separately in any event, and the Government will have the burden — or the opportunity and the benefit of two separate arguments to the jury about the conspiracy and about Mr. Christunas.

I can't believe that Mr. Cares really thinks that the evidence of Mr. Christunas's wealth will be — will become stale because at a joint trial — or, excuse me, at a separate proceeding and when Mr. Christunas testifies, obviously, he's going to testify and be cross-examined about the accumulation of wealth, his tax returns, and all of this. That's the heart of — that's going to be, I assume, the heart of the Government's cross-examination. So, again, the Government will have the opportunity and the advantage of getting that information before the jury, not once, as it would in a joint trial, but twice.

I don't think that the Government really has made, under any sort of showing of prejudice. And I believe that the Defendant will suffer real and actual prejudice if his (21) request is not granted. Thank you.

THE COURT: Mr. LaRene —

MR. LARENE: Sir?

THE COURT: — with — in your estimation, which Defendants would be prejudiced by your client's testimony, and how?

MR. LARENE: The — I think the principal detriment would be to Ken's brother, David. I can be more specific, I suppose. I would — it's clear there is evidence that — that David Christunas was arrested with 100 — a couple hundred pounds of marijuana in 1990, well after Kenneth Christunas says that he withdrew from involvement in marijuana trafficking.

There is evidence that Ken — that David Christunas was a signator and a permitted — was permitted entry on a safety deposit box, specifically the safety deposit box to which — in which $74,000 of unexplained cash was found, two years after Mr. Ken Christunas was last in it.

I have attempted to — to suggest by my — however well or poorly, and I will argue to the jury that the records of the safety deposit — of the safety deposit box are not accurate, are not complete. I believe there is testimony from which I'll be able to argue that, on the record and before the Court — before the Court and jury, there were entries that were unrecorded.

(22) The logical candidate, I guess, for that — upon whom — okay, the logical candidate for the unrecorded entries in — in our theory, of course, would be David Christunas.

There are a number of other things, but that is principally — that's — that's principally the direction, or two of the directions in which the testimony will go.

THE COURT: So really, David Christunas you're talking about because you've got — of course, you've got other Defendants here who have previously asserted the fact that — that they intended to present a defense of withdrawal.

MR. LaRENE: Obviously, James — James Christunas and — and Arthur Brayman, who are now taking the position that the Government hasn't proved their involvement, would suffer as well. And — and the Court has already heard, by way of proffer from their lawyers, the testimony that they would have expected from Ken Christunas, that would have been contrary to — would not have been contrary to their defense of withdrawal, but would have been contrary to their currently asserted position that the Government has not shown their involvement. Of course, those are relatives of Mr. Christunas, as well.

THE COURT: All right. Anything further?

MR. HOWARD: Yes, your Honor. May I have —

THE COURT: All right. Certainly.

MR. HOWARD: — one minute — I'll be brief.

(23) THE COURT: Yes, go ahead — go ahead.

(At about 9:33 A.M. - discussion off the record.)

MR. HOWARD: Your Honor, first of all, just very briefly touching on the — the — the statement that the U.S. Attorney cited in the brief in with connection with innocence, it goes without saying, Judge, that you would have to take that in a legal context, and innocence, insofar as the law is concerned, has to do with the quantum of proof, and it's not just simply a moral declaration with regard to my client's integrity and character.

I can — I can represent to this Court, your Honor, that a key person, according to the Government, and that is Ken Christunas, will testify on behalf of my client if this Court grants us the bifurcation. And I think that's important. And insofar as prejudice to the Government is concerned, Judge, I — I had the benefit of the discovery, such as was made available to me, and I certainly do not suggest that they withheld anything. And I will represent to this Court that the — that the Government virtually followed the track of the discovery in terms of presenting the evidence against my client.

THE COURT: Uh-huh.

MR. HOWARD: So there really is no basis for prejudice, your Honor, insofar as the bifurcation. And at the same time, there are compelling equities. And as I previously (24) indicated to the Court, I had difficulty communicating with my client, and it wasn't until late in the — in the proceedings that I — I came to the realization that he's always thinking in terms of sentencing guidelines, as opposed to what the impact of a — of a withdrawal defense is.

So I would ask the Court to grant us that withdrawal, and represent, at the same time, that a key witness, and that's what we have to establish in a conspiracy withdrawal, significant actions of a key witness, would testify on behalf of my client.

THE COURT: All right. Thank you. Anything further?
MR. CARES: Nothing further.
THE COURT: All right. Well, I think it's helpful for the Court to review some of the history of — of this matter, under the rather unusual, to say the least, circumstances that now arises by virtue of the change in position asserted by Defendants James Christunas and — and Arthur Brayman, and then the concomitant change in position asserted by Defendants Kenneth Christunas and Robert Johnson.

First, as — as to James Christunas and Arthur Brayman, and of course, they are not involved in this motion, but I think their stance in this matter, as previously asserted and as now asserted, is helpful in resolving the issue, and that's why I dwell on the — on the history of (25) their motion for a little bit here.

Back on August the 31st, 1992, James Christunas and Mr. Brayman filed their motion for a severance under Rule 14, alleging, first of all, that they were charged only with being involved in the conspiracy from 1983 to May of 1991. That is, they were charged only in Count 1.

Also they alleged in their motion that the Government's evidence with respect to them would, if believed, establish their involvement in marijuana trafficking with one or more of the other Defendants in this case.

Also that they, that is, James Christunas and Mr. Brayman, had available to them the defense of withdrawal. That is, that they withdrew from the conspiracy, although having been involved in the conspiray, they withdrew from that conspiracy more than five years prior to April 13th, 1992, which is the date of the indictment in this case.

They alleged in that motion that it was essential to establish their defense of withdrawal, that they obtain the testimony of their co-Defendants in this case, and that it was unlikely that the co-Defendants would testify, if tried jointly, with them, but that such testimony would likely be available if a severance was granted, first of all. And secondly, then that the co-Defendants,

that is, Kenneth Christunas, David Christunas, Robert Johnson, and Herbert Micou, were tried first. Obviously, it wouldn't work at all, (26) I guess, if it were — if the order were reversed.

They alleged in the motion that the severance should be granted to permit them, that is, James Christunas and Arthur Brayman, to obtain this testimony essential to their defense of withdrawal and to secure their right to a fair trial guaranteed by the due process clause of the Fifth Amendment, and the right to compulsory process guaranteed by the Sixth Amendment.

They also claimed a right to a severance because of the alleged disparity of the weight of evidence to be offered against them, as compared with the weight of the evidence to be offered, or apt to be offered against their co-Defendants.

They also alleged that the defenses of the — of their various co-Defendants would likely be antagonistic to their Defendants and that a joint trial would result in confusion to the jury and — and so forth.

And so, therefore, they asked for a severance, and for their trial then to follow the trial of their co-Defendants: Kenneth Christunas, David Christunas, Robert Johnson, and Herbert Micou, in order that they be able then to establish their defense of withdrawal.

The defense of withdrawal from a conspiracy is, of course, an affirmative defense which must be proven by the defendant, asserting that defense. And there are a number of Sixth Circuit decisions that so hold, and I might mention — (27) well, maybe I won't mention unless I can locate them here. I think it's — yes, it's *Blue* v. *United States* — these are all Sixth Circuit decisions. *Blue* v. *United States,* 138 F.2d 351, a 1943 decision; *United States* v. *Battista,* 646 F.2d 237, a 1981 decision; *U.S.* v. *McLeron,* 746 F.2d 1098, a 1984 decision; And *U.S.* v. *Payne,* 962 F.2d 1226, a 1992 decision. And also, of course, that's made clear by the Sixth Circuit Pattern Jury Instruction Number 3.11(c).

Along with that motion there was an affidavit signed and filed. The affidavit signed by Mr. LaRene, the attorney for Kenneth Christunas. And in that affidavit, Mr. LaRene stated that he would advise Kenneth Christunas not to testify in his own defense.

Mr. LaRene went on the affidavit to say that, after resolution of the case against Kenneth Christunas, then he would be available to testify on behalf of James Christunas and Arthur Brayman. And Mr. LaRene stated that it was his understanding that Kenneth Christunas would — would present and provide testimony in support of the defense of James Christunas and Arthur Brayman, if there were severance, and if they were tried, that is, James Christunas and Arthur Brayman, were tried after the other Defendants were tried.

The — Mr. LaRene stated in the affidavit, and I quote:

> "It is not my intention in this affidavit to make any (28) representations as to what that testimony would consist of, but I would prepare to make such representations in an *ex parte* in camera proceeding."

The Government, on September the 10th, 1992, then answered the motion of James Christunas and Arthur Brayman for a severance. The Government correctly pointed out in the answer that the joinder of these Defendants, under Federal Rule of Criminal Procedure 8, was appropriate in a case such as this where it's alleged that the Defendants participated in the same series of criminal acts or transactions constituting the offense charged.

Among many cases so holding is *U.S.* v. *Johnson,* 763 F.2d 773, which is a 1985 Sixth Circuit decision. And of course, as the Government pointed out and as this Court agrees, the general rule is that parties jointly indicted should be tried together.

> "There's a strong policy in favor of joint trials, and defendants seeking — a defendant seeking severance has a heavy burden of showing specific and compelling prejudice, and denial of severance will be

overruled only on a showing of clear abuse of discretion by the trial court."

Among cases so holding, from the Sixth Circuit, are *U.S.* v. *Davis,* 809 F.2d 1194; *U.S.* v. *Hessling,* 845 F.2d 617; *U.S.* v. *Horton,* 847 F.2d 313 — that's 847 F.2d 313; and *U.S.* (29) v. *Causey,* 834 F.2d 1277.

And the Causey case, which I've just mentioned, holds also that:

"A defendant moving for severance to obtain favorable testimony from a co-defendant must satisfy a very stringent test. The test that must be satisfied is that the defendant must demonstrate, first of all, that there's a bona fide need for the testimony; secondly, the defendant must demonstrate the test — the substance of the — of the testimony which is sought to be obtained from the co-defendant; third, the defendant must demonstrate the exculpatory nature in effect; and fourth, the defendant must provide an assurance that the co-defendant will testify if the severance is granted."

It was the Government's position that the Defendants Brayman and — and James Chrustunas fell short meeting those tests. The matter was argued before a magistrate judge, who, on February the 19th, 1993, issued an order denying the motion for a severance, basically, on the — on the grounds and for the reasons, although the Court didn't go into any detail, I would assume it was on the basis of the authority cited — cited by the Government, which the Court — which this Court also finds to be appropriate and applicable.

However, the magistrate judge suggested that there be a partial bifurcation of trial for these two Defendants. (30) The magistrate judge held that counsel for Kenneth Christunas had been unable to assure the Court at the February 18th, 1993 hearing that Kenneth Christunas would, indeed, testify at a subsequent severed trial of James Christunas and Arthur Brayman to the effect that there had been a withdrawal on their part from the alleged conspiracy prior to April the 13th, 1987.

I might parenthetically remark that I think the magistrate indicated that — that if there had been that sort of assurance, then the ruling might have been different.

The magistrate, however, did suggest the possibility of a partial bifurcation of the trial, wherein the Government would present all its evidence against all six Defendants, and then the four co-Defendants, that is the Defendants other than — other than Brayman and James Christunas, would present their evidence. The jury would then deliberate regarding the verdicts as to the four Defendants other than Brayman and James Christunas. And after those verdicts had been returned, then James Christunas and Arthur Brayman be given the opportunity to present their evidence. And then the jury deliberate regarding a verdict as to James Christunas and Arthur Brayman.

On February the 26th, 1993 James Christunas and Mr. Brayman filed their appeal of the magistrate's order of February 19th, 1993, and in the alternative requested a (31) bifurcated trial, as suggested by the magistrate.

The Government responded on March the 3rd, 1993 to that appeal of the magistrate's order of February 19th, 1993, denying severance to James Christunas and Brayman. The Government pointed out in its response that the United States Supreme Court has very recently laid to rest the belief that defendants who present antagonistic defenses, or desire to present antagonistic defenses, should be entitled to a severance, citing the decision just came down within the last several weeks in the case of *Zafiro* v. *United States.* That's — that was on an appeal from the *Zafiro* case in the Seventh Circuit, *Zafiro* v. *United States,* 945 F.2d 881, a 1991 Seventh Circuit 1991 decision in which certiorari was granted in 1992, and then the Supreme Court ruled, as I say, just within the last several weeks.

As to the request for severance, the Government asserted that James Christunas and Brayman had failed to meet their burden under the decision in *U.S.* v. *Causey,* which I've previously mentioned, and which

sets out the stringent test to be met, or required to be met, where a defendant seeks a severance in order to obtain a testimony of a co-defendant. That is:

> "That there be, first of all, a showing of a bona fide need for the testimony; secondly, that there be a showing of the substance of the testimony; third, that there be a (32) showing of its exculpatory nature and effect; and fourth, that there be provided to the Court an assurance the co-defendant will, in fact, testify if the cases are severed."

It's my interpretation that those same tests apply, whether we're talking about severance or we're talking about the alternative remedy of a bifurcated trial.

On March the 12th, 1993, Mr. Brayman and James Christunas supplemented their appeal to the magistrate's order of February 19th, 1993, denying severance. Then on March the 15th, 1993, this Court affirmed the magistrate's order of February 19th 1993, denying severance — the severance motion of James Christunas and Mr. Brayman, but this Court granted their request for a bifurcated trial to be conducted in accordance for the procedure that I outlined a few moments ago in my remarks, whereupon the verdicts would be returned as against the four Defendants, other than Brayman and James Christunas, and then those two Defendants would be allowed to present their defense of withdrawal, and then the jury deliberate as to a verdict on the charges against them.

I granted that request on the basis of the fact that there was a close family relationship here, which I felt would make it difficult, even for James Christunas and Brayman to testify themselves, in support of their defense of withdrawal, since to do so would necessarily implicate their co-Defendants (33), family members in a number of cases.

Well, I think that in doing that I really stretched a point, because when you look at the tests that were outlined, we did not have — whether or not the first three

tests have been met is questionable. But certainly the fourth leg of that test hadn't been not. There had not been provided an assurance that the testimony would be given. We didn't know whether the testimony would be given, and obviously, as it's been pointed out, I think, previously in the proceedings, even if Kenneth Christunas were, for instance, convicted in the bifurcated trial, he would be in a very chancy position, in deed, if he testified then in support of the — of the defense of withdrawal by the — made by the two Defendants who had been granted the bifurcated trial, in that, in the event that his conviction were reversed, a new trial were granted, then his testimony to the effect that, indeed, he was involved in a conspiracy, but that these two Defendants had withdrawn from that conspiracy would certainly be available to be used against him on a retrial of this matter.

So I really never had that assurance, but just basically because there was the family relationship involved, I really stretche the point a great deal in, I believe, in granting a bifurcated trial to those two Defendants. But then, of course, as of April the 5th, 1993, that is yesterday, James Christunas and Mr. Brayman withdrew their request for a (34) bifurcated trial, and so there will be no separate consideration under the present circumstance. That is, the case would go to the jury against all six Defendants, and verdicts would be considered by the jury regarding all six Defendants at one time, without any bifurcation of the trial process.

Now, let's take a look at the situation involving Defendants Kenneth Christunas and Robert Johnson. Back on September the 16th 1993, they filed a motion for a severance. And they alleged that, in their motion, that since James Christunas and — and Mr. Brayman had in their motions, asserted that they intended to present a defense of withdrawal from the conspiracy, this antagonistic defense would unfairly prejudice themselves, that is, Kenneth Christunas and Robert Johnson.

There's no mention at all in that motion, or in the supporting brief, or in any supporting documentation, that it was their position that they had withdrawn from a conspiracy, they intended or expected or had any expectation of presenting a defense of withdrawal from the conspiracy. Rather, it appears that it was their position that — that they were innocent. The Government would not be able to establish, beyond a reasonable doubt, their guilt of the alleged conspiracy and the other charges in this case.

The Government responded to that motion on October (35) the 20th, 1993 (sic). The Government urged that joinder had been proper under — under Rule 8, and that there was no right to severance under Rule 14. And the magistrate denied, on February 19th, 1993, that motion of Defendants Kenneth Christunas and Mr. Johnson, for severance.

On March the 1st, 1993, Defendants Kenneth Christunas and Johnson also appealed the magistrate's order denying severance. And on March the 11th, 1993, this Court affirmed the magistrate's February 19th, 1993 order denying the severance motion of Defendants Kenneth Christunas and — and Johnson.

Now, the other — the other Defendants, other than — than Mr. Brayman and Mr. James Christunas, also have joined in that motion for severance, but I don't mention them because they're not part of this controversy at the present time.

Now, then, on April the 5th, that is yesterday, during the trial, and as this trial nears its completion, the Court is notified, as I've previously indicated, that Mr. Brayman and Mr. James Christunas are withdrawing their request for a bifurcated trial, and at that point, then, for the first time, Defendants Kenneth Christunas and Johnson request a bifurcated trial on the basis of an assertion that they now will present the defense of withdrawal. That is, the defense that they, while they were involved in a criminal conspiracy, they had withdrawn from that conspiracy prior to April the (36) 13th, 1987.

Quite frankly, it just appears to the — this Court that this is an attempt to really sort of crassly manipulate the trial process in this matter. That is, there's been a — an entire, at the very last stage of this trial, there's been an entire switch and reversal of strategy and tactics, and while it's possible to do that, certainly, it seems to me that for the Court to change the entire trial procedure to accommodate counsel in that regard would not be appropriate.

The — these Defendants have, as I stated, never asserted that they wished to produce any evidence of withdrawal. Their motion for severance was on an entirely different grounds. They never even hinted, even vaguely hinted, that they expected to submit evidence of withdrawal. I think the position taken by the Government that their trial strategy would have been quite different had they been aware that there was this intention to produce — to submit that sort of a defense is — is a worthy one, really.

It seems to the Court, this — this strategy makes it appear — makes it appear to the Court that this is the situation, quite frankly: that Mr. Brayman and James Christunas originally felt that the — there would be such substantial evidence here in this case against them, that their best opportunity was to admit participation in the conspiracy, but then claim withdrawal from that conspiracy.

(37) Now, they've heard the Government's case. Virtually all of the Government's testimony is in, and have concluded, so it seems to the Court, at least, that their best opportunity in this matter is for an acquittal on the basis of a reasonable doubt as to their guilt, in that the Government's proofs, as to themselves, are perhaps not as strong as they might have anticipated they were at the time that they indicated they wanted to assert the defense of withdrawal.

Now, on the other hand, Defendants Kenneth Christunas and Johnson, it would appear to this Court, intended originally to defend this case on the basis of

reasonable doubt, that is, innocence. That is the fact that the Government would be unable to produce evidence that would convince the jury beyond a reasonable doubt of their guilt on the conspiracy count.

But now that they've heard the Government's case, virtually all of the Government's case, I think maybe we have — may have one witness left, but the Government's case is virtually completed as I've been led to believe here by counsel — they — they now have concluded that, it would seem to me, it's logical for me to draw the conclusion or the inference, that they've concluded that the Government's case is a good deal stronger than they anticipated.

Mr. LaRene has, as a matter of fact, you sort of hinted to that or indicated that in your remarks here this (38) morning. And that under those circumstances then, their best shot in this trial is to now reverse their strategy, admit their involvement in the conspiracy, but claim that they withdrew; a position which, of course, is contrary to the position they've asserted throughout the trial. And it just seems to me that that's a sort of a crass attempt to manipulate the — the Court in this particular instance, and the Court is not going to countenance it.

Beyond that, I might mention that — that — that the four part test set up in *U.S.* v. *Causey* has not been met. The — the — there's been no indication here of the substance of the testimony, which is to be — which the Defendants, Mr. Johnson and Mr. Kenneth Christunas, hope to offer in support of their defense of withdrawal. They also have not provided the Court with — with a demonstration of the exculpatory nature in effect of that testimony. And they've certainly not provided any assurance that any co-defendant will, in fact, testify on their behalf if there is a bifurcation granted at this point.

So the Court is not going to countenance that request, and the Court does deny the request for a bifurcated trial made by Defendants Kenneth Christunas and — and Mr. Robert Johnson. All right.

Now, are we ready to proceed?

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